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FOIA UPDATE

Legislative Update

FOIA Reform Proposed

Efforts to amend the Freedom of Information Act continue on Capitol Hill.

Major highlights of the efforts to amend the FOIA have been the presentation of the Administration's proposal (see pp. 3-8 of FOIA Update) by Assistant Attorney General Jonathan C. Rose of the Justice Department's Office of Legal Policy, and subsequent hearings on this proposal (S. 1751/H.R. 4805) and on a similar proposal, S. 1730, Senator Orrin G. Hatch's FOIA reform bill. Senator Hatch is chairman of the Subcommittee on the Constitution of the Judiciary Committee. The Hatch subcommittee has held six hearings on the need for FOIA reform.

In presenting the Administration's proposal on Oct. 15, Assistant Attorney General Rose declared that the Administration stands "fully committed to carrying out the philosophy and spirit of the Act."

Rose told the Hatch subcommittee that the Administration is "concerned that in some instances the Freedom of Information Act has been used in ways that are inconsistent with the original objectives of the Congress." These include efforts for disclosures which have "interfered unduly with proper law enforcement activities and national security functions," Rose said. He also pointed to the considerable expense involved in FOIA processing and the diversion of agency resources from program responsibilities.

The Office of Legal Policy began its comprehensive review of the need for FOIA reform in May of this year by asking federal agencies to comment on problems encountered in administer-

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On Agency Practice

Recordkeeping Procedures Examined

With few exceptions, records in the physical possession of a federal agency are subject to the Freedom of Information Act.

Agencies do not, however, have to retain indefinitely all records which are created by or submitted to them. Under the Federal Records Act, 44 U.S.C. §3102 and §3103, agencies are required to establish records management programs which identify records that should be preserved and to plan for the storage and disposal of records having only temporary significance.

It is estimated that only about five percent of government records, because of their administrative, legal, research or other value, become part of the permanent national collection. For a variety of reasons, many more records are retained for longer periods of time than are required.

In addition, some materials can be returned to submitters in the private sector, because of the circumstances under which they were obtained, once there is no longer a need for them. Agencies should be aware that once a Freedom of Information Act request has been received, the requested records assume a special status and ordinarily must be retained until the requester's access rights are determined.

Federal records, generally speaking, fall into two categories: administrative materials which are standard throughout the entire government and for which there is a schedule for retention and disposition furnished by the National Archives and Records Service (NARS), and other materials which are related to the kinds of programs conducted by the individual agencies. Individual schedules for retention and final disposition of records are developed by agency personnel in consultation with the Archivist of the United States.

The Justice Effort

At the Justice Department, there is a full scale effort underway to help managers and clerical workers focus on files maintenance and records disposition practices. Under the guidance of Bernie Berglind of the Justice Management Division's Records and Publications Staff, a course in files maintenance and records disposition will be given five times in 1982, beginning with a class Jan. 5-6.

In the course, Berglind points out that almost every move made in government generates paperwork. Some of this material—for example, reading files, informational copies and acknowledgements—need not be kept.

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Legislative Update

...FOIA Improvement Bill Introduced

ing the FOIA and to recommend specific changes in the law. The Administration's legislative proposal represents a synthesis of these recommendations.

The Administration's proposal includes two additional exemptions to the existing nine; clarification of several existing exemptions; modifications of provisions to allow for new time limits and fee assessments; additional procedures and protections for business information; and new provisions which would preclude use of the FOIA by persons other than U.S. citizens and by parties to lawsuits who have discovery rights.

Substantive amendments to the current FOIA exemptions include:

Exemption 1—The standard for judicial review with respect to classified records is proposed to be the "arbitrary or capricious" standard.

Exemption 2—The proposal extends confidentiality to manuals and instructions to investigators, inspectors, auditors and negotiators, and also to examination material used in employment, certification or licensing.

Exemption 4—The Administration's bill would enlarge the protection accorded business records by providing that such records are exempt if their release "may impair either the legitimate competitive, financial, or business interests of any person or the government's ability to obtain such information in the future." In addition, the bill provides procedures by which submitters of such information may have input into agency disclosure determinations. Finally, courts deciding "reverse FOIA" cases would review agency disclosure decisions according to a *de novo* standard.

Exemption 6—The Administration's bill extends personal privacy protection to "records or information concerning individuals"; changes the balancing standard from a "clearly unwarranted invasion of personal privacy" to an "unwarranted invasion of personal privacy"; and exempts compilations of names and addresses that could be used for solicitation purposes.

Exemption 7—The Administration's bill makes the following changes: broadening of the exemption's threshold language; addition of language to ensure that investigatory information related to ongoing investigations is fully protected; protection of information that would "tend to" disclose the identity of a confidential source; and modification of existing language to further protect confidential sources.

The bill would also provide an exemption for material related to investigations of terrorism, organized crime or foreign counterintelligence, where designated by the Attorney General.

Two additional exemptions would allow agencies to protect records generated in settlement of a legal action and technical data which may not be exported outside of the United States without agency approval.

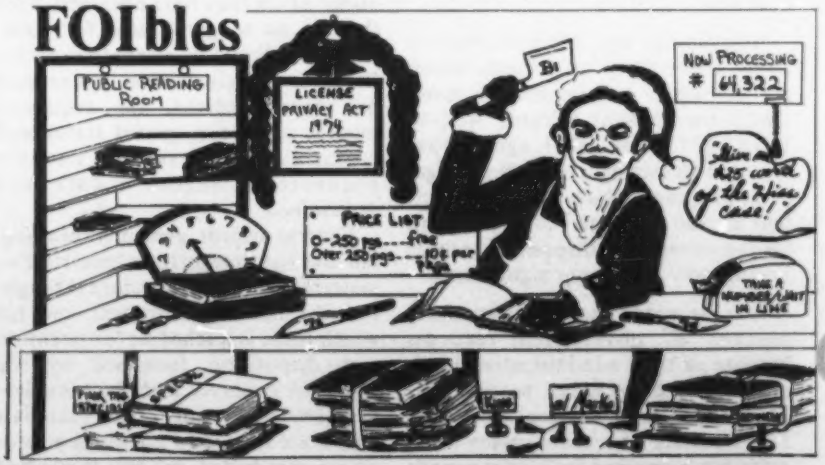
The bill also provides for two new standards for assessing fees. The first one authorizes fees for the full costs attributable to the processing of requested records. The second permits assessments which reflect the true value of valuable technological or reference information.

On the problem of time limits, the Administration proposal would retain the 10-day time limits for material which can be processed without complication in eight working hours or less. Agencies could take up to a year to respond to more complex or voluminous requests and requests where the interests of a submitter are involved, but would have to provide a specific time estimate and explanation within 30 working days of receipt.

The Administration bill also addresses the problem of the use of FOIA for discovery purposes by prohibiting a party to a judicial or administrative proceeding from filing a FOIA request for records relating to the subject matter of the proceeding.

Consideration of the Administration's package and of S. 1730 continued in the Senate Subcommittee on the Constitution during November.

Rep. Glenn English, chairman of the House Subcommittee on Government Information and Individual Rights, also has held hearings on the Freedom of Information Act and has indicated that he will consider further hearings and markup of a bill after the Senate takes action.



FOIA UPDATE

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The Cartoon

The cartoon for the December Update was provided by Deborah French Helland, a FOIA classification analyst at the Federal Bureau of Investigation for several years. Mrs. Helland now lives in Channel View, Texas.

U.S. Department of Justice
Office of Information Law and Policy

FOIA UPDATE

Text of Freedom of Information Act

Showing Changes Proposed in S. 1751/H.R. 4805

(Added words are italicized; deleted words are bracketed.)

§552. Public Information; agency rules, opinions, orders, records, and proceedings

(a) Each agency shall make available to the public information as follows:

(1) Each agency shall separately state and currently publish in the Federal Register for the guidance of the public—

(A) descriptions of its central and field organization and the established places at which, the employees (and in the case of a uniformed service, the members) from whom, and the methods whereby, the public may obtain information, make submittals or requests, or obtain decisions;

(B) statements of the general course and method by which its functions are channeled and determined, including the nature and requirements of all formal and informal procedures available;

(C) rules of procedure, descriptions of forms available or the places at which forms may be obtained, and instructions as to the scope and contents of all papers, reports, or examinations;

(D) substantive rules of general applicability adopted as authorized by law, and statements of general policy or interpretations of general applicability formulated and adopted by the agency; and

(E) each amendment, revision or repeal of the foregoing.

Except to the extent that a person has actual and timely notice of the terms thereof, a person may not in any manner be required to resort to, or be adversely affected by, a matter required to be published in the Federal Register and not so published. For the purpose of this paragraph, matter reasonably available to the class of persons affected thereby is deemed published in the Federal Register when incorporated by reference therein with the approval of the Director of the Federal Register.

(2) Each agency, in accordance with published rules, shall make available for public inspection and copying—

(A) final opinions, including concurring and dissenting opinions, as well as orders, made in the adjudication of cases [;], *if the final opinions or orders are cited, used, or relied on as precedent by the agency;*

(B) those statements of policy and interpretations which have been adopted by the agency and are not published in the Federal Register; and

(C) administrative staff manuals and instructions to staff that affect a member of the public;

unless the materials are promptly published and copies offered for sale. To the extent required to prevent *an* [clearly] unwarranted invasion of personal privacy, an agency may delete identifying details when it makes available or publishes an opinion, statement of policy, interpretation, or staff manual or instruction. However, in each case the justification for the deletion shall be explained fully in writing. Each agency shall also maintain and make available for public inspection and copying current indexes providing identifying information for the public as to any matter issued, adopted, or promulgated after July 4, 1967, and required by this paragraph to be made available or published. Each agency shall promptly publish, quarterly or more frequently, and distribute (by sale or otherwise) copies of each index or supplements thereto unless it determines by order published in the Federal Register that the publication would be unnecessary and impracticable, in which case the agency shall nonetheless provide copies of such index on request at a cost not to exceed the direct cost of duplication. A final order, opinion, statement of policy, interpretation, or staff manual or instruction that affects a member of the public may be relied on, used, or cited as precedent by an agency against a party other than an agency only if—

(i) it has been indexed and either made available or published as provided by this paragraph; or

(ii) the party has actual and timely notice of the terms thereof.

(3)*(A)* Except with respect to the records made available under paragraphs (1) and (2) of this subsection, each agency, upon any request *by any United States person* for records which [(A)] *(i)* reasonably describes such records and [(B)] *(ii)* is made in accordance with published rules stating the time, place, fees (if any), and procedures to be followed, shall make the records promptly available to [any person] *the requester.*

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(B) A requester shall not make or maintain a request under this paragraph for records relating to the subject matter of any ongoing judicial or adjudicatory administrative proceeding (civil or criminal) to which the requester, or any person upon whose behalf the requester acts in making the request, is a party.

(C) An agency may require by regulation that each request for records under this section include declarations by the requester that the requester, or any person upon whose behalf the requester acts in making the request, is:

(i) a United States person as defined in this section, and

(ii) not barred by subsection (a) (3) (B) from making the request.

A request that does not comply with any such regulation requirement is not a proper request under this section.

(4) (A) In order to carry out the provisions of this section, each agency shall promulgate regulations, pursuant to notice and receipt of public comment, specifying a uniform schedule of fees applicable to all constituent units of such agency. *The schedule may provide for the payment of all costs reasonably attributable to responding to the request, including the costs of searching for, reviewing, and duplicating requested records.* [Such fees shall be limited to reasonable standard charges for document search and duplication and provide for recovery of only the direct costs of such search and duplication.] *If the requested records contain commercially valuable technological or reference information, generated or acquired by the government at substantial cost to the public, fees may be charged which reflect the fair market value or royalties or both, in addition to or in lieu of any processing fees otherwise chargeable, taking into account such factors as the estimated commercial value of the information, its cost to the government, and any public interest served by its disclosure.* Documents shall be furnished without charge or at a reduced charge where the agency determines, *in the exercise of its discretion,* that waiver or reduction of the fee is in the public interest because furnishing the information can be considered as primarily benefiting the general public.

(B) Each agency shall promulgate regulations, pursuant to notice and receipt of public comment, specifying procedures by which—

(i) a submitter may be required to designate, at the time of submission, any information consisting of trade secrets, commercial or financial information, or other commercially valuable information, which is exempt from disclosure under subsection (b) (4);

(ii) the agency shall notify the submitter that a request has been made for information provided by the submitter within a reasonable time prior to a decision to release any such information;

(iii) the submitter may, within ten working days of the forwarding of such notification, submit to the agency written objection to such disclosure specifying all grounds upon which it is contended that the information should not be disclosed; and

(iv) the agency shall notify the submitter of any final decision to release such information.

(C) An agency is not required to notify a submitter pursuant to subparagraph (B) if—

(i) the information requested is not designated by the submitter as exempt from disclosure in accordance with agency regulations promulgated pursuant to paragraph (4) (B) (i), if such designation is required by the agency;

(ii) the agency determines, prior to giving such notice, that the request should be denied;

(iii) the disclosure is required by law (other than this section); or

(iv) the information lawfully has been published or otherwise made available to the public.

(D) If a submitter has objected, pursuant to subparagraph (B) (iii), to disclosure of information that the agency determines to be exempt from disclosure under subsection (b) (4), the agency shall not release such information unless the agency determines in writing that the failure to disclose the records would injure an overriding public interest and disclosure is not otherwise prohibited by law.

[(B)] *(E)* On complaint *filed by a requester within 90 days from the date of final agency action or by a submitter prior to the release of submitted information,* the district court of the United States in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated, or in the District of Columbia, has jurisdiction—

(i) to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from [the complainant.] *the requester; or (ii) to enjoin the agency from any disclosure of records which was objected to by a submitter under subparagraph (B) (iii) or which would have been objected to had notice been given as required by subparagraph (B) (ii).*

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(F) In an action based on a complaint—

(i) by a requester, the court shall have jurisdiction over any submitter of information contained in the requested records, and any such submitter may intervene as of right in the action; and

(ii) by a submitter, the court shall have jurisdiction over any requester of records containing information which the submitter seeks to have withheld, and any such requester may intervene as of right in the action.

(G) The agency that is the subject of the complaint shall promptly, upon service of a complaint—

(i) seeking the production of records, notify each submitter of information contained in the requested records that the complaint was filed; and

(ii) seeking the withholding of records, notify each requester of the records that the complaint was filed.

(H) In any action in which a requester is an intervenor or is joined the court shall on timely motion of the requester transfer the action to a district court which would have had jurisdiction had the action been brought by the requester, unless the court otherwise directs for good cause shown.

(I) In a case in which a record is withheld under subsection (b) (1), the court shall not enjoin the agency from withholding such record unless the agency's action is found to be arbitrary or capricious. In [such a case] *all other cases,* the court shall determine the matter de novo [,]. [and] *The court* may examine the contents of [such] *requested* agency records in camera to determine whether such records or any part thereof shall be withheld under any of the exemptions set forth in subsection (b) of this section [,]. [and] *T*[t]he burden is on the agency to sustain its action *to withhold information and the burden is on any submitter seeking the withholding of information. The court shall maintain under seal any affidavit or record submitted in camera to the court in support of the applicability of any exemption, and shall stay any order requiring the release of records pending final judicial resolution of any appeal from such order.*

[(C)]*(J)* Notwithstanding any other provision of law, the defendant shall serve an answer or otherwise plead to any complaint made under this subsection within thirty days after service upon the defendant of the pleading in which such complaint is made, unless the court otherwise directs for good cause shown.

[(D)] *(K)* Except as to cases the court considers of greater importance, proceedings before the district court, as authorized by this subsection, and appeals therefrom, take precedence on the docket over all cases and shall be assigned for hearing and trial or for argument at the earliest practicable date and expedited in every way.

[(E)] *(L)* The court may assess against the United States *or any submitter who is a party to the litigation* reasonable attorney fees and other litigation costs reasonably incurred in any case under this section in which the [complainant] *requester* has substantially prevailed.

[(F)] *(M)* Whenever the court orders the production of any agency records improperly withheld from the complainant and assesses against the United States reasonable attorney fees and other litigation costs, and the court additionally issues a written finding that the circumstances surrounding the withholding raise questions whether the agency personnel acted arbitrarily or capriciously with respect to the withholding, the Special Counsel shall promptly initiate a proceeding to determine whether disciplinary action is warranted against the officer or employee who was primarily responsible for the withholding. The Special Counsel, after investigation and consideration of the evidence submitted, shall submit his findings and recommendations to the administrative authority of the agency concerned and shall send copies of the findings and recommendations to the officer or employeee or his representative. The administrative authority shall take the corrective action that the Special Counsel recommends.

[(G)] *(N)* In the event of noncompliance with the order of the court, the district court may punish for contempt the responsible employee, and in the case of a uniformed service, the responsible member.

(5) Each agency having more than one member shall maintain and make available for public inspection a record of the final votes of each member in every agency proceeding.

(6) (A) Each agency, upon request [for records] made under paragraph (1), (2), or (3) of this subsection *for records which are sufficiently identified and limited that no more than eight working hours of search and review time are required to respond to the request, and which do not contain trade secrets, commercial or financial information, or other commercially valuable information provided by a submitter,* shall—

(i) determine within ten *working* days [(excepting Saturdays, Sundays, and legal public holidays)] after the receipt of any

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such request whether to comply with such request and shall immediately notify the person making such request of such determination and the reasons therefor, and of the right of such person to appeal to the head of the agency any adverse determination; and

(ii) make a determination with respect to any appeal within twenty *working* days [(excepting Saturdays, Sundays, and legal public holidays)] after the receipt of such appeal. If on appeal the denial of the request for records is in whole or in part upheld, the agency shall notify the person making such request of the provisions for judicial review of that determination under paragraph (4) of this subsection.

[(B) In unusual circumstances as specified in this subparagraph, the time limits prescribed in either clause (i) or clause (ii) of the subparagraph (A) may be extended by written notice to the person making such request setting forth the reasons for such extension and the date on which a determination is expected to be dispatched. No such notice shall specify a date that would result in an extension for more than ten working days. As used in this subparagraph, "unusual circumstances" means, but only to the extent reasonably necessary to the proper processing of the particular request—

(i) the need to search for and collect the requested records from field facilities or other establishments that are separate from the office processing the request;

(ii) the need to search for, collect, and appropriately examine a voluminous amount of separate and distinct records which are demanded in a single request; or

(iii) the need for consultation, which shall be conducted with all practicable speed, with another agency having a substantial interest in the determination of the request or among two or more components of the agency having substantial subject-matter interest therein.]

(B) Except as provided in subparagraph (A), each agency, upon any request for records made under paragraph (1), (2) or (3) of this subsection shall—

(i) within thirty working days after the receipt of the request—

(a) determine whether to comply with such request, in whole or in part, and immediately notify the requester of such determination and the reasons therefor, and of the requester's right to appeal to the head of the agency any adverse determination; or

(b) notify the requester of the estimated time period required for such determination, and the reasons therefor, such time period to be established in accordance with agency regulations promulgated hereunder but not to exceed one year; and

(ii) within thirty working days after the receipt of an appeal—

(a) make a determination of the appeal; or

(b) notify the requester of the estimated time period required for such determination, and the reasons therefor, such time period to be established in accordance with agency regulations promulgated hereunder but not to exceed six months.

If on appeal the denial of the request for records is in whole or in part upheld, the agency shall notify the requester of the provisions for judicial review of that determination under paragraph (4) of this subsection.

(C) Each agency shall promulgate regulations, pursuant to notice and receipt of public comment, specifying the time periods under subparagraph (B). Such regulations shall provide for the shortest practicable time periods and shall take into account all relevant factors, including but not limited to—

(i) the volume of requests and appeals received by the agency;

(ii) the resources available to the agency for the processing of such requests and appeals;

(iii) the volume of records required to be searched to locate all records responsive to the request or appeal;

(iv) the volume of responsive records required to be reviewed for release pursuant to the request or appeal;

(v) the need to search for or review records maintained in field facilities or other establishments that are separate from the agency office processing the request or appeal;

(vi) the character of the records requested;

(vii) the need for consultation, which shall be conducted with all practicable speed, with another agency or among two or more components of the agency having substantial subject matter interest therein; and

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(viii) the need for notification of submitters of information and for consideration of any objections to disclosure made by such submitters.

(D) Each agency shall promulgate regulations, pursuant to notice and receipt of public comment, by which a requester who demonstrates a compelling need for expedited access to records and whose request for information will primarily benefit the general public may, as a matter of the agency's discretion, be given processing priority over other requesters.

[(C)] *(E)* Any [person making a request to any agency for records under paragraph (1), (2), or (3) of this subsection] *requester* shall be deemed to have exhausted his administrative remedies with respect to such request if the agency fails to comply with the applicable time limit provisions of this paragraph. *If a requester files a complaint under paragraph (4)(E), the administrative remedies of a submitter of information contained in the records which are the subject of the request shall be deemed to have been exhausted.*

If the Government can show exceptional circumstances exist and that the agency is exercising due diligence in responding to the request, the court may retain jurisdiction and allow the agency additional time to complete its review of the records. Upon any determination by an agency to comply with a request for records, the records shall be made promptly available to [such person making such request.] *the requester, except that if the disclosure of records is objected to by a submitter pursuant to paragraph (4) (B) (iii), the agency shall not disclose the records for fifteen working days after notice of the final decision to release the requested information has been forwarded to the submitter.* Any notification of denial of any request for records under this subsection shall set forth the names and titles or positions of each person responsible for the denial of such request.

(7) An agency is not required to disclose any material requested under this subsection which consists of newspaper clippings, magazine articles, court records, publications available from the Government Printing Office, or any similar items which are in the public record or otherwise publicly available, but the agency shall inform the requester of the nature of such public source materials.

(8) Nothing in this section shall be deemed applicable in any way to the informant records maintained by a law enforcement agency under an informant's name or personal identifier, whenever access to such records is sought by a third party according to the informant's name or personal identifier.

(b) This section does not apply to matters that are—

(1) (A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive order;

(2) related solely to the internal personnel rules and practices of an agency [;], *including such materials as (A) manuals and instructions to investigators, inspectors, auditors, and negotiators, and (B) examination material used solely to determine individual qualifications for employment, promotion, and licensing;*

(3) specifically exempted from disclosure by statute (other than section 552b of this title), provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld;

(4) trade secrets, and commercial or financial information *or other commercially valuable information,* obtained from [a] *any* person [and] *if the information is* privileged or [confidential] *if its release may impair either the legitimate competitive, financial, or business interests of any person or the government's ability to obtain such information in the future;*

(5) inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency;

(6) [personnel and medical files and similar files the disclosure] *records or information concerning individuals the release* of which would constitute a*n* [clearly] unwarranted invasion of personal privacy[;], *including compilations of lists of names and addresses that could be used for solicitation purposes;*

(7) [investigatory] records *or information* compiled for law enforcement purposes, but only to the extent that the production of such records *or information* would (A) [interfere with] *reveal investigatory information relating to an ongoing investigation or* enforcement proceeding[s], (B) deprive a person of a right to a fair trial or an impartial adjudication, (C) constitute an unwarranted invasion of personal privacy, (D) *tend to* disclose the identity of a confidential source, *including any foreign, state, or other public agency or authority or any private institution that furnished information on a confidential basis,* and, in the case of a record *or information* compiled by a criminal law enforcement authority in the course of a

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criminal investigation, or by an agency conducting a lawful national security intelligence investigation, [confidential] information furnished [only] by [the] *a* confidential source, (E) disclose [investigative] techniques, [and] procedures, *guidelines, or priorities for law enforcement investigations or prosecutions,* [*or*] *(F)* endanger the life or physical safety of [law enforcement personnel] *any natural person, or (G) disclose information relating to such categories of investigations of terrorism, organized crime, or foreign counterintelligence as are defined by the Attorney General by regulation or order;*

(8) contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions; [or]

(9) geological and geophysical information and data, including maps, concerning wells[.];

(10) records generated by the United States or any party in connection with the settlement of a legal action in which the United States is a party or has an interest; or

(11) technical data that may not be exported lawfully outside the United States without an approval, authorization, or a license from an agency, unless the requester has obtained the appropriate approval, authorization, or license.

Any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection.

(c) This section does not authorize withholding of information or limit the availability of records to the public, except as specifically stated in this section. This section is not authority to withhold information from Congress.

(d) On or before March 1 of each calendar year, each agency shall submit a report covering the preceding *fiscal* [calendar] year to the Speaker of the House of Representatives and President of the Senate for referral to the appropriate committes of the Congress. This report shall include—

(1) the number of determinations made by such agency not to comply with requests for records made to such agency under subsection (a) and the reasons for each such determination;
(2) the number of appeals made by persons under subsection (a) (6) the result of such appeals, and the reason for the action upon each appeal that results in a denial of information;
(3) the names and titles or positions of each person responsible for the denial of records requested under this section, and the number of instances of participation for each;
(4) the results of each proceeding conducted pursuant to subsection (a) (4) [(F)] *(M),* including a report of the disciplinary action taken against the officer or employee who was primarily responsible for improperly withholding records or an explanation of why disciplinary action was not taken;
(5) a copy of every rule made by such agency regarding this section;
(6) a copy of the fee schedule and the total amount of fees collected by the agency for making records available under this section; and
(7) such other information as indicates efforts to administer fully this section.

The Attorney General shall submit an annual report on or before March 1 of each calendar year which shall include for the prior [calendar] *fiscal* year a listing of the number of cases arising under this section, the exemption involved in each case, the disposition of such case, and the cost, fees, and penalties assessed under subsections (a) (4) [(E)] *(L),* [(F)] *(M),* and [(G)] *(N).* Such report shall also include a description of the efforts undertaken by the Department of Justice to encourage agency compliance with this section.

(e) For purposes of this section [, the term]—

(1) "agency" as defined in section 551(1) of this title includes any executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of the Government (including the Executive Office of the President), or any independent regulatory agency;
(2) "submitter" means any person who has submitted to an agency (other than an intelligence agency) trade secrets, commercial or financial information (other than personal financial information), or other commercially valuable information, in which the person has a commercial or proprietary interest;
(3) "requester" means any person who makes or causes to be made, or on whose behalf is made, a proper request for disclosure of records under subsection (a);
(4) "United States person" means a citizen of the United States or an alien lawfully admitted for permanent residence (as defined in section 101(a)(20) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(20)), an unincorporated association a substantial number of members of which are citizens of the United States or aliens lawfully admitted for permanent residence, or a corporation which is incorporated in the United States, but does not include a corporation or an association that is a foreign power, as defined in section 101(a) of the Foreign Intelligence Surveillance Act of 1978 (50 U.S.C. 1801(a));
(5) "working days" means every day excluding Saturdays, Sundays, and federal legal holidays;
(6) "record" means existing documentation of information in any form, including computer tapes and discs, but does not include system software or documentation created for the personal convenience of any government employee or official.

***Worthington Compressors, Inc., et al. v. Costle*, Nos. 80-1010, 80-1011, 80-1012, 80-1013 (D.C. Cir., Aug. 20, 1981).**

The Court of Appeals for the District of Columbia Circuit in this case expanded the availabilty of FOIA Exemption 4 by identifying a new factor to be considered when determining if submitted business material is confidential.

Four manufacturers of portable air compressors who submitted reports on their products to the Environmental Protection Agency (EPA) were the appellants in this case. They requested confidential treatment for their information, but the agency rejected their objections to disclosure on the grounds that the information could be duplicated by anyone with access to the air compressors through "reverse engineering." The manufacturers then sought to enjoin release in the district court. They contended that the information constituted confidential commercial information and should be withheld under Exemption 4. Further, they alleged that the reverse engineering which could be undertaken to determine the design and engineering specifications of their compressors would be so expensive as to be commercially impracticable. The district court below sustained the agency and ordered disclosure.

The court of appeals, however, reversed. In determining whether information is confidential in Exemption 4 cases, the circuit court said it is proper to determine "whether release of the requested information, given its commercial value to competitors and the cost of acquiring it through other means, will cause substantial competitive harm to the business that submitted it." Accordingly, the court concluded, consideration should be given to how costly it would be for a possible competitor to obtain the information through means other than the FOIA and whether FOIA disclosure would constitute a windfall to the requester.

***Bast v. U.S. Department of Justice*, Nos. 79-2039, 80-1050 (D.C. Cir., Sept. 10, 1981).**

This case grew out of a hearing in a previous case. Richard Bast, a private investigator, alleged that U.S. District Judge John Pratt improperly induced a court reporter to expunge a portion of a hearing transcript in the earlier case. Bast then requested access to all FBI documents compiled during the investigation into the allegation. After the FBI released approximately 600 pages of such documents, Bast brought suit challenging all withholdings. With a few exceptions, the district court agreed that the remaining documents were exempt from disclosure.

On appeal, 12 documents remained at issue. The agency asserted that all of the withheld material fell within Exemption 7(C)—the investigatory records exemption relating to personal privacy. The D.C. Circuit Court of Appeals said that while Exemption 7(C) affords broad privacy rights to "suspects, witnesses and investigators," there still must be a case-by-case balancing of privacy rights against the public interest in disclosure.

After reviewing the documents *in camera* the court decided that, with one exception, the privacy interest outweighed the public interest. The unique exception is a three-sentence passage containing comments by the judge which the circuit court found could be interpreted as revealing a bias. "The public importance of judicial impartiality outweighs the privacy interest in this case," the court ruled in ordering disclosure of that passage. A petition for rehearing has been filed by the Department of Justice.

***Brown v. Federal Bureau of Investigation*, 658 F.2d 71 (2d Cir. 1981).**

In this case, a convicted kidnapper sought access to detailed information from FBI files regarding his kidnaping victim. He argued that the victim had waived her privacy rights by testifying at his trial and that, in any event, he had an overriding need for the information in order to attack his conviction. The Court of Appeals for the Second Circuit found that the requested information was properly withheld under Exemption 6 and rejected the plaintiff's arguments. After finding the requested information to be sufficiently personal to satisfy the "similar files" threshold of Exemption 6, the court of appeals held that the victim's testimony at the trial did not constitute a waiver of "her right to keep private other related matters." Most significantly, the court of appeals found the plaintiff's stated interest in using such information to obtain a new trial to be "too uncertain, indirect, and remote" to overcome the victim's privacy interests in nondisclosure. (A somewhat contrary outcome on this latter point was reached by the Third Circuit Court of Appeals in *Ferri v. Bell*, published at 645 F.2d 1213, earlier this year, but that decision was vacated on Oct. 23 by the Third Circuit and scheduled for reargument.)

***Radovich v. United States Attorney, District of Maryland*, 658 F.2d 957 (4th Cir. 1981).**

"Confidential" as used in the first clause of Exemption 7(D) does not mean "secret;" rather, it means "given in confidence" or "in trust," the Court of Appeals for the Fourth Circuit made clear in this case.

The court below had found that the information sought by the plaintiff in this case was not protected because it was publicly known that the source had spoken with government prosecutors. Accordingly, said the district court, the identity of the source—an attorney for an individual involved in the criminal investigation—was "neither confidential nor at issue." In overruling the district court, the circuit court of appeals concluded that the first clause of Exemption 7(D) serves to protect the attorney's conversations so long as the information was given under an express assurance of confidentiality or in circumstances where such an assurance could reasonably be assumed. Public knowledge of the source's identity is irrelevant, the appellate court found.

The Fourth Circuit also examined the second clause of Exemption 7(D), which the district court has found likewise inapplicable, and construed it broadly as well. The circuit court found that Congress intended to protect all of the information furnished by a confidential source "in the course of a criminal investigation, irrespective of whether the information might have been available from some other source."

FOIA Counselor

Paths to Information

Discovery and the Freedom of Information Act are two entirely distinct means by which information may be obtained from the federal government.

Discovery is a device used by a party in litigation in order to obtain information from an entity or an individual (usually an opposing party) relating to the subject matter of a case. Discovery requests are generally limited only by traditional standards of relevancy, privilege and burden. *See, e.g.,* Rule 26 of the Federal Rules of Civil Procedure. Discovery may be sought in written form through interrogatories, or in oral form through depositions. It may also be sought through requests for the production of documents. *See* Rule 34 of the Federal Rules of Civil Procedure.

The Freedom of Information Act, on the other hand, provides a general right of access to federal records. The FOIA may be used by "any person" to seek access to "reasonably described" records maintained by any federal agency. The access afforded by the FOIA is thus often duplicative of that available through discovery.

Attempts are often made by parties in litigation to use the FOIA in place of, or in addition to, discovery. Under present law there is no statutory prohibition to the use of FOIA as a discovery tool. The Supreme Court found in *NLRB v. Sears, Roebuck & Co.,* 421 U.S. 132, 143 n.10 (1975), that under existing law a requester's rights are not diminished by his or her status as a litigant.

The present use of the FOIA as a discovery tool can create problems for government attorneys in litigation. For example, government attorneys often do not realize that an opponent has duplicative access to information under the FOIA and may be exercising that right. Information obtained through the FOIA without the attorney's knowledge may take litigants by surprise when used by the opposing party. A government attorney must also be aware of a release of information under the FOIA which might prevent a later assertion of privilege.

Because of the problems which can be created by the use of the FOIA as a discovery tool, it is extremely important that agency personnel processing FOIA requests and government attorneys carefully coordinate their efforts.

Attorneys should inform agency personnel having custody of records that a related matter is in litigation and of the significance of the records to the litigation. The FOIA processors then will be able to advise the attorney of what requests have been made and of what material is contemplated to be released.

Similarly, where broad access to material is granted in discovery, subsequent assertion of FOIA exemptions for the material is usually not possible, so it is important to inform FOIA offices of discovery releases. *See, e.g., North Dakota v. Andrus,* 581 F.2d 177 (8th Cir. 1978). Notifying one another will ease problems for both groups.

The use of the FOIA in place of discovery has concerned government litigators and policymakers for some time. The Supreme Court also voiced its disapproval of the use of the FOIA as a discovery tool in *NLRB v. Robbins Tire & Rubber Co.,* 437 U.S. 214 (1978), stating that this was not an intended function of the act.

The Administration's proposed Freedom of Information Improvements Act of 1981 (see pp. 3-8) addresses this concern. Proposed new subsection (a)(3)(B) would prohibit the use of the FOIA as a discovery device by a party to a judicial or adjudicatory administrative hearing or by any requester acting for such a party. This would solve the problem of FOIA requests duplicating discovery access in litigation, while leaving untouched a requester's ability to make a request for information before litigation begins. Until such a proposed modification of existing law is enacted, however, government attorneys and FOIA personnel alike should make every effort possible to coordinate their actions.

Certiorari Granted

The Supreme Court granted *certiorari* Nov. 9 in *Washington Post Co. v. U.S. Department of State,* 647 F.2d 197 (D.C. Cir. 1981), a case in which the Court of Appeals for the District of Columbia Circuit concluded that Exemption 6 was not broad enough to protect records concerning the suspected application for United States citizenship of Iranian nationals living in Iran.

In seeking *certiorari,* the Department of Justice contended to the Supreme Court that the court of appeals' "construction of Exemption 6 finds no support in the exemption's language or legislative history, defeats its underlying purpose and cannot be reconciled with this Court's explanation of the exemption in *Department of the Air Force v. Rose,* 425 U.S. 352 (1976)."

The Department also said review of the *Washington Post* decision is necessary to resolve a conflict among the circuits on this aspect of Exemption 6, and because of the "potentially far-reaching consequences" of the D.C. Circuit's decision.

This brings to three the number of FOIA cases accepted by the Supreme Court for review this term.

The Court has also granted *certiorari* in *Abramson v. Federal Bureau of Investigation,* 658 F.2d 806 (D.C. Cir. 1980). The issue in *Abramson* is whether information extracted from FBI records and summarized for a White House "name check" loses its protection under Exemption 7 in that recompilation process. (See *FOIA Update,* September 1981.)

Also before the Court is *Shapiro v. Klutznick,* 636 F.2d 1210 (3d Cir. 1980), *cert. granted, sub nom. Baldrige v. Shapiro,* 101 S.Ct. 779 (1981), which concerns the ability to withhold census data under Exemption 3. The *Shapiro* case was scheduled for oral argument on Dec. 2; no argument date has yet been set for either *Abramson* or *Washington Post.*

Additionally, it is expected that the government will petition for *certiorari* in the case of *Holy Spirit Ass'n v. CIA,* 636 F.2d 838 (D.C. Cir. 1980), which involves a FOIA request for classified documents.

...Regulations, Cases Furnish Guides on Records

continued from page 1

Other routine material need not be kept for as long as some offices may keep it. In fact, a significant portion is covered by the routine retention and disposal schedule.

At the FAA

Over the years, the Federal Aviation Administration (FAA) has reviewed a great deal of material in the complex process of certifying the airworthiness of airplanes and the safety of parts and modifications.

At first, the FAA took the position that this material—called Type Design Data—was the sort of "agency records" required to be retained. Although this information was generally thought to be in large part protected under Exemption 4 of the FOIA, it was often sought by tort litigants involved in suits against both large and small manufacturers. "A classic use of the FOIA in place of discovery," notes John Walsh, chief of the General Law Branch, FAA.

Then came two Supreme Court decisions clarifying what constitutes an "agency record" under the FOIA. "Two recent Supreme Court decisons establish that the Government has no obligation, and perhaps no right, to consider manufacturers' technical data not in its possession to be agency records covered by the Freedom of Information Act (FOIA), 5 U.S.C. §552. *Kissinger v. Reporters Committee for Freedom of the Press,* 445 U.S. 136 (1980); *Forsham v. Harris,* 445 U.S. 169 (1980)," Walsh noted in a memo.

He then concluded that technical data which "never physically reaches FAA premises because it is examined by designees of the Administrator is not 'obtained' by the FAA and, therefore, is not susceptible to disclosure under the FOIA."

Further, "technical data which has been returned by the FAA to the manufacturer before a FOIA request for it is received, because the FAA has no current need for it, is not in the possession or control of the FAA and, therefore, is not susceptible to disclosure under the FOIA..."

The FAA's new policy includes an agreement with the manufacturers that secures the records should a court disagree with agency policy or should there be some question as to the business future of a manufacturer.

The Antitrust Division

The Justice Department's Antitrust Division and the Federal Trade Commission follow similar procedures related to return of materials.

At the Antitrust Division, there is a long-standing practice of returning documents submitted in response to a grand jury subpoena or a civil investigative demand, once the investigation is completed. Rules for limiting the retention of these documents are spelled out in a Division Directive dated Dec. 18, 1980.

For case law authorizing the practice of returning subpoenaed documents see *Application of Bendix Aviation Corp.,* 58 F. Supp. 953 (S.D.N.Y. 1945), and *In re Petroleum Industry Investigation,* 152 F. Supp. 646 (E.D. Va. 1957).

At the FTC, Jack Schwartz, deputy assistant general counsel, said that the 96th Congress, apparently noting that DOJ's practices seemed to be working, "in essence required the FTC to adopt a formal practice" of returning original documents to submitters. The FTC would keep copies, only as needed, Schwartz says. The FTC regulation, adopted in accord with P.L. 96-252, states that "[A]ny person who has submitted documentary material to the Commission may file a written request for the return of original documents which have not been received into evidence (1) after the close of the proceeding in connection with which the documents were submitted, or (2) when no proceeding in which the material may be used has been commenced within a reasonable time..."

In sum, the timely application of destruction schedules and other record disposition techniques can result in superior records management and less costly FOIA searches. A list of General Services Administration courses in records and files management appears on page 12 of FOIA Update.

FEMA Offers FOIA Training

The FOIA training course for Federal Emergency Management Agency (FEMA) employees was a success, judging from the comments of those attending the first seminar. "Excellently prepared and presented," "interesting and informative," and "enlightening and extremely helpful," said some of those evaluating the course.

Linda Keener, FOIA/Privacy specialist in the Office of Public Affairs at FEMA, and Tom Ainora, an attorney in the Office of General Counsel, prepared the training materials and conducted the course, aimed at providing FEMA employees with a working knowledge of the FOIA.

Several people also commented that all employees, especially managers and supervisors, should be required to take the course. One employee observed that the FOIA is relevant for all federal employees and that they need FOIA training to become aware of "what is expected of public servants." The course will be offered to supervisors in December.

Tom Ainora

Keener said the course has been expanded to provide more background on the Privacy Act and to allow a longer period for questions. Keener and Ainora plan to give one course every two months until all interested personnel have been trained.

FEMA is responsible for assisting federal, state and local governments in preparing for and responding to natural, man-made and nuclear disasters.

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- INTRODUCTION TO THE MAINTENANCE AND DISPOSITION OF FEDERAL RECORDS

April 5-9
Interocean Building, 521 9th St., NW

- INTRODUCTION TO THE CREATION AND USE OF FEDERAL RECORDS

March 15-19
July 26-30
GSA Training Center, Crystal City, VA

- MICROGRAPHICS FUNDAMENTALS

Feb. 1-3
April 14-16
June 16-18
Sept. 7-9
GSA Training Center, Crystal City, VA

OILP Publishes 1981 Case List

The new *Freedom of Information Case List* (September 1981 edition) published by the Office of Information Law and Policy (OILP) is available through the Superintendent of Documents, Government Printing Office, Washington, D.C. 20402.

The price of the *Case List*, an annual Justice Department publication, is $4.75. The stock number is 027-000-01127-6.

Edited by Cheri L. McCracken, an attorney-adviser in OILP, the *Case List* includes approximately 300 new cases that have been added since the publication of the 1980 edition. It now contains a total of 1,339 FOIA case listings, arranged alphabetically, and is also indexed according to subject matter.

In addition, it also contains listings of "reverse FOIA" cases, Privacy Act cases, Sunshine Act cases, and cases decided under the Federal Advisory Committee Act, as well as the texts of the major access laws.

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Office of Information and Privacy

FOIA UPDATE

MAR 30 1982

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Office of Information and Privacy

New FOIA Office Established

The Department of Justice has established a new office, the Office of Information and Privacy (OIP), to help discharge its responsibilities under the Freedom of Information Act, the Privacy Act of 1974, and related access statutes. Formed through the merger of the Office of Information Law and Policy and the Office of Privacy and Information Appeals, the new OIP will remain within the Department's larger Office of Legal Policy, headed by Assistant Attorney General Jonathan C. Rose.

All functions of the two predecessor offices, including publication of *FOIA Update* and the *Freedom of Information Case List*, have been assumed by the new OIP. In addition to the policy and administrative appeal responsibilities, OIP attorneys will also handle some government-wide FOIA and Privacy Act litigation.

"The consolidation of these functions into a single office will strengthen the Justice Department's ability to discharge its statutory responsibilities and to implement the Administration's FOIA policies," stated Assistant Attorney General Rose. The Office of Information and Privacy will have a combined personnel strength of 33, including 16 attorneys and eight paralegals.

The new office is headed by two co-directors, Richard L. Huff and Daniel J. Metcalfe, who served as acting directors of the predecessor offices in recent months.

Huff, a 1968 graduate of Hastings College of the Law, also holds a master of laws degree from Georgetown University. He was named deputy director of the Office of Privacy and Information Appeals in 1978 and became acting director of that office in 1981. Before joining the Justice Department in 1976, Huff served in the Office of the Judge Advocate General of the Army.

Metcalfe is a 1976 graduate of the George Washington University Law School, where he was on the editorial board of the law review. He served as law clerk to Judge Oliver Gasch of the

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FOIA Reform Bill Moves Forward

The Freedom of Information Reform Act—a comprehensive FOIA revision supported by the Administration—has moved forward for consideration in the Senate this spring.

The Constitution Subcommittee of the Senate Judiciary Committee, chaired by Senator Orrin G. Hatch, marked up S. 1730, Senator Hatch's reform bill, in mid-December as the first session of the 97th Congress drew to a close.

The markup incorporated provisions of S. 1751, the Administration's FOIA improvements bill, into the measure, which received bipartisan support. The full Judiciary Committee is expected to clear the bill by the end of March.

Action by the Constitution Subcommittee followed a series of six hearings chaired by Senator Hatch on the Freedom of Information Act. Three days of hearings were also held by Rep. Glenn English's Subcommittee on Government Information and

Individual Rights in the first session of this Congress. English has said that his subcommittee will consider additional hearings and markup of a bill revising the FOIA after the Senate has completed its action.

The bill as marked up by the Constitution Subcommittee would make comprehensive FOIA improvements, all supported by the Administration. These include:

Fees—The Office of Management and Budget would be authorized to issue guidelines to assist agencies in promulgating uniform fee regulations. Under the bill, agencies would not charge a fee for any request that requires no more than two hours of processing time and which results in the release of no more than 20 pages of records. The bill otherwise authorizes agencies to charge for "all costs reasonably and directly attributable" to a request, including search, duplication

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...Work Proceeds on FOIA Reform

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and processing. In addition, an agency could elect to charge fees reflecting the fair market value of valuable technological information developed or acquired by the government at substantial cost. The section also calls for reduction or waiver of fees in cases in which it can be determined that it is in the public interest to do so. One half of all fees collected in FOIA processing would be retained by agencies.

Time Limits—Under this section of the bill an agency would still have 10 working days in which to inform a requester as to whether it will make a release and to provide a justification for its action, but it would be able to invoke an extension of 60 working days based upon "unusual circumstances." The new bill broadens the number and scope of such "unusual circumstances" to include such factors as the volume of requests received, requests which may impair or impede an agency's work, and requests which involve consultation with a submitter. An agency would also retain the right to invoke "exceptional circumstances" beyond the initial 70 working days, and under the bill it would not be deemed in violation of law absent the issuance of a court order. The new proposal also includes a provision allowing expedited access when it is determined by an agency to be in the public interest.

Notice to Submitters—The bill contains a section providing for notice to be given to submitters of trade secrets, or research, financial or business information, when there has been a FOIA request for the information. Submitters would have 10 working days to object to release. If the information is exempt, the agency could not make a discretionary release unless the failure to do so would impair the public interest.

Judicial Review—The measure provides that requesters have 180 days from the date of final agency action, and submitters have the period prior to release, in which to file complaints seeking to compel or prevent disclosure, respectively. The court in which the original complaint is filed would have jurisdiction over both the requester and submitter. The bill would also provide new procedural protections for the security of *in camera* submissions.

Duplicative Requests—The bill would free an agency from having to produce under the FOIA any material already a matter of public record. An agency would also be able to look at instances in which a requester has made several requests within a two-year period and may promulgate regulations aimed at avoiding unnecessary duplication of effort and material.

The Exemptions

The new bill would establish the arbitrary or capricious standard of review for Exemption 1 information; would strengthen Exemption 2 by expressly protecting manuals, instructions to inspectors, investigators, auditors, and negotiators, as well as examination material; and would broaden Exemption 4 by protecting information when release could impair competitive, research, financial or business interests.

The reform bill would also remove the threshold "files" requirement of Exemption 6 and would specify that an invasion of personal privacy would be "clearly unwarranted" absent any overriding disclosure benefit to the public interest.

The bill would likewise broaden the threshold language of Exemption 7, as well as the protections for information relating to ongoing investigations and for information pertaining to law enforcement sources. In addition, categories of records pertaining to investigations of terrorism, organized crime or foreign counterintelligence matters could be protected where designated by the Attorney General.

New Exemptions

Two additional exemptions would allow agencies to withhold records generated in settlement of a legal action and technical data subject to export rules.

New Protections

The bill would limit use of the Freedom of Information Act to United States citizens, lawful aliens, U.S. corporations or unincorporated associations with a substantial membership of citizens and would allow agencies to prohibit its use by felons. There is also a provision prohibiting requesters from using the FOIA in place of, or in addition to, existing judicial discovery rights. Finally, the bill would provide special protection for informant records when sought by third parties.

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FOIA UPDATE

FOIA Update welcomes written comments and contributions from its readers, including letters to the editor and other material suitable for publication. Such material may be submitted to the Managing Editor, *FOIA Update*, Office of Information and Privacy, Room 6345, Main Justice Building, Washington, D.C. 20530. Tel: (202) 633-2674.

The OIP

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United States District Court for the District of Columbia during 1976-77. Before being named acting director of the Office of Information Law and Policy in late 1981, Metcalfe was a trial attorney in the Civil Division of the Justice Department for four years, specializing in FOIA and Privacy Act litigation.

Jean K. FitzSimon, who became acting deputy director of the Office of Privacy and Information Appeals in 1981, will continue to serve as the deputy director of OIP. Miriam M. Nisbet will continue to serve as chief of the Classification Review Unit within OIP. Both will also assist in the supervision of OIP litigation.

U.S. Department of Justice
Office of Information and Privacy

FOIA UPDATE

FOIA Counselor

Discovery, the Privacy Act and FOIA

In the last issue of *FOIA Update*, it was emphasized in this column that under existing law parties to litigation can freely use the Freedom of Informaton Act to duplicate, or even supplement, their discovery rights. We now turn to a related area that has recently been the subject of many questions from agency personnel: the production in discovery of information that is subject to protection under the Privacy Act of 1974, 5 U.S.C. §552a. As will be seen, the correct resolution of such discovery requests requires that careful determinations be made under both the Privacy Act and the Freedom of Information Act.

It is not uncommon for agencies in litigation to receive discovery requests for information that is subject to the Privacy Act's disclosure prohibition, 5 U.S.C. §552a(b). Such discovery can take the form of requests for the direct production of documents under Fed.R.Civ.P. 34, interrogatories seeking the disclosure of information contained in agency records under Fed.R.Civ.P. 33, requests for admissions seeking such information under Fed.R.Civ.P. 36, or even questions posed during the course of depositions. In any form, the disclosure of information contained in any agency "record" within a "system of records" that is "retrieved by reference to an individual name or some other personal identifier" is subject to regulation under the Privacy Act. 5 U.S.C. §552a(a); Office of Management and Budget Privacy Act Implementation Guidelines and Responsibilities, 40 Fed. Reg. 28948, 28952 (July 9, 1975).

For example, an agency being sued by one of its employees for alleged discrimination will likely receive discovery requests for records (or derivative information) pertaining to the plaintiff's co-workers. Such records would doubtless be maintained in agency personnel files and would thus be subject to the Privacy Act. Subsection (b) of the Privacy Act prohibits disclosure of records subject to it, except under 11 specified circumstances. *See* 5 U.S.C. §552a(b)(1)-(11). Violation of this prohibition can subject an agency to civil penalties under subsection (g) of the Act, 5 U.S.C. §552a(g), and can also subject individual agency employees to criminal penalties under subsection (i), 5 U.S.C. §552a(i). Discovery thus prohibited by the Privacy Act is properly objected to on the ground of privilege under Fed.R.Civ.P. (26(b)(1). *Cf. Baldrige v. Shapiro*, 50 U.S. L.W. 4227, 4231 (U.S., Feb. 24, 1982).

Therefore, it is vitally important for an agency in receipt of a discovery request to determine whether the request seeks the disclosure of Privacy Act-protected information and, if so, whether disclosure is permitted by one of the 11 exceptions to subsection (b). These exceptions are for the most part highly specialized and are best examined on a case-by-case basis.* One of the exceptions, however, warrants special attention because it permits disclosure of Privacy Act-protected information to the extent that such disclosure "is required under [the Freedom of Information Act]." 5 U.S.C. §552a(b)(2).

Assuming that a discovery request for Privacy Act-protected information does not fall within one of the other ten exceptions to subsection (b), an agency is prohibited from complying with the request (and therefore may object to the discovery on the ground of privilege) *only* to the extent that the information at issue is *not* required to be disclosed under the FOIA. To determine this, the agency must act as if it had received a FOIA request for the information and determine whether it is exempt from disclosure under the FOIA.

Any information determined not to be exempt from disclosure would be "required" to be disclosed under the FOIA, would thus fall within subsection (b)(2) of the Privacy Act, would therefore not be prohibited from disclosure by the Privacy Act, and would *not* be privileged information subject to a valid discovery objection on that basis. On the other hand, any information determined to be exempt from disclosure would not be "required" to be disclosed under the FOIA, would therefore be prohibited from disclosure by the Privacy Act (if none of the other ten disclosure exceptions were applicable), and *would* be privileged.

A useful illustration of this analysis is set forth by the U.S. Court of Appeals for the Tenth Circuit in *Weahkee v. Norton*, 621 F.2d 1080 (10th Cir. 1980), where an agency was deemed to have raised a privilege objection to discovery insofar as the discovery inquired into matters exempt under the FOIA. Significantly, *Weahkee* also stands for the proposition that a district court cannot sustain such a discovery objection without first determining de novo—as would be determined in a FOIA lawsuit--that the information at issue is properly exempt under the FOIA and thus is not "required" to be disclosed within the meaning of this exception to the Privacy Act's disclosure prohibition. *See* 621 F.2d at 1082.

In sum, agencies in receipt of discovery requests will often be forced by the Privacy Act to assess the requested information according to FOIA standards to determine whether it is privileged, and they should be prepared to support their privilege claims as they would FOIA claims (*e.g.*, with *Vaughn* affidavits or *in camera* submissions) if they want them to be sustained.** Only with careful attention to the applicability of the Privacy Act in discovery situations—and to the special interplay between the Privacy Act and the FOIA through Privacy Act subsection (b)(2)—can agencies ensure that they are properly responding to discovery requests.

* Questions concerning the construction and applicability of these Privacy Act provisions should be directed to the General Counsel's Office of the Office of Management and Budget, which is the "lead agency" for the Privacy Act.

** Where an agency has no true objection to responding to a discovery request, other than its interest in not violating the Privacy Act, it is often possible to have the matter resolved through the issuance of a court order (often a stipulated protective order) so that the disclosure is undertaken "pursuant to the order of a court of competent jurisdiction" in satisfaction of subsection (b)(11) of the Privacy Act. *See, e.g., Clymer v. Grzegorek*, 515 F. Supp. 938, 942 (E.D. Va. 1981), *citing* 5 U.S.C. §552a(b)(11). In this connection, it should be noted that two courts have refused to regard a subpoena *duces tecum* as such an order. *See Bruce v. United States*, 621 F.2d 914, 916 (8th Cir. 1980); *Stiles v. Atlanta Gas Light Co.*, 453 F. Supp. 798, 800 (N.D. Ga. 1978).

***Crooker v. Bureau of Alcohol, Tobacco and Firearms*, No. 80-1278 (D.C. Cir., Dec. 8, 1981) (*en banc*).**

In this case, the U.S. Court of Appeals for the District of Columbia Circuit, sitting *en banc*, established a two-part test for determining whether law enforcement manuals are exempt from disclosure under Exemption 2: (1) the document must meet the standard of "predominant internality," and (2) disclosure of the document must "significantly risk circumvention of agency regulations or statutes."

At issue in *Crooker* were certain portions of a BATF surveillance training manual. After a review of the legislative history and case law on Exemption 2, the D.C. Circuit adopted the House Report version of the exemption, determining that Congress intended it to be used to withhold "those internal matters not the subject of legitimate public interest." Under this view, it found the part of the BATF manual at issue to fall within Exemption 2.

The court of appeals emphasized that the "critical considerations" in this case were that the manual "is used for predominantly internal purposes; it is designed to establish rules and practices for agency personnel, i.e., law enforcement investigatory techniques; it involves no 'secret law' of the agency; and it is conceded that the public disclosure would risk circumvention of agency regulations."

This *en banc* decision somewhat clarifies the law in the District of Columbia Circuit by specifically rejecting almost all of the rationale (and by implication the holding as well) of the D.C. Circuit's previous decision in *Jordan v. U.S. Department of Justice*, 591 F.2d 753 (D.C. Cir. 1978) *(en banc)*. *Jordan* held that prosecutorial guidelines could not be withheld under Exemption 2 and, in dicta, strongly suggested that law enforcement manuals were similarly nonexempt.

***Pratt v. Webster*, No. 81-1907 (D.C. Cir., Jan. 22, 1982)—reversing 508 F. Supp. 751 (D.D.C. 1981).**

In this case, the U.S. Court of Appeals for the District of Columbia Circuit reversed a lower court's holding that documents generated by the FBI's counterintelligence program ("COINTELPRO") failed to satisfy the threshold "law enforcement purposes" requirement of Exemption 7. Although the court of appeals observed that certain of the documents concerning the Black Panther Party involved illegal FBI practices, it found that the records "derived at least in part from a purpose to enforce and prevent violations of the criminal laws."

While the D.C. Circuit thus held that these particular records were compiled for a law enforcement purpose, it declined to apply the broad "agency rule" adopted in *Kuehnert v. FBI*, 620 F.2d 662 (8th Cir. 1980), and *Irons v. Bell*, 596 F.2d 468 (1st Cir. 1979). The Eighth and First Circuits there adopted the rule that a document generated by a law enforcement agency such as the FBI is almost automatically deemed to be an investigatory record compiled for law enforcement purposes within the meaning of Exemption 7.

The court of appeals decided in *Pratt* to adopt a more probing standard for claims of "law enforcement purposes" made by criminal law enforcement agencies, one consisting of two requirements: (1) that the agency's investigatory activities at issue must be related to the enforcement of federal laws or to the maintenance of national security, and (2) that "the nexus between the investigation and one of the agency's law enforcement duties must be based on information sufficient to support at least 'a colorable claim' of its rationality." The Department of Justice has filed a petition for rehearing on this issue.

***Stein v. Department of Justice*, 662 F.2d 1245 (7th Cir. 1981).**

In this decision, the U.S. Court of Appeals for the Seventh Circuit had occasion to focus upon two important issues surrounding the national security exemption, 5 U.S.C. §552(b)(1). Concerning the standard of review, the Seventh Circuit held that "Congress did not intend that the courts would make a true *de novo* review of classified documents, that is, a fresh determination of the legitimacy of the classification of each classified document." Instead, the courts are only to require further agency submissions if the affidavits initially reviewed are found insufficient. The court of appeals observed that such review certainly furthers the purposes of the FOIA because the very "prospect of having to justify its classification decisions before a neutral arbiter causes a more thorough and objective presubmission review by the agency than would otherwise be the case."

With respect to the substantive standards for classification, the court of appeals rebuffed the plaintiff's assertion that certain of the information at issue could not be classified because it had in fact been discussed in newspaper articles. It held that the status of classified documents should not be affected by public speculation about their contents, even if such speculation is accurate. Forcing official confirmation of matters only surmised by the press, the court of appeals concluded, might well cause foreign governments to take action that otherwise would not be taken.

***Pies v. Internal Revenue Service*, No. 79-2303 (D.C. Cir., Nov. 6, 1981)—reversing 484 F. Supp. 930 (D.D.C. 1979).**

The U.S. Court of Appeals for the District of Columbia Circuit has ruled that Exemption 5 protects unpublished IRS draft regulations and related memoranda interpreting a repealed IRS Code section. The drafts did not represent the agency's "working law," the D.C. Circuit held, despite their partial incorporation into related regulations.

The district court had found that the drafts constituted the "final work product" of the agency and therefore should be disclosed. The court of appeals reversed, however, because the drafts had never obtained "official sanction as [an] IRS interpretation or statement of policy," nor had they ever been distributed, even within the agency.

"A decision holding otherwise would be to rule that all similar documents and memoranda that are used as research tools by attorneys in the agency, even though never finalized nor approved to reflect agency policy, would be subject to release to the public," the court of appeals stated. It further observed that such documents could mislead the public.

In contrast with the materials at issue in this case, the court of appeals noted that documents distributed throughout an agency which embody the agency's final position and comprise a part of the administrative history of approved regulations are subject to mandatory disclosure.

***Miller v. Bell*, 661 F.2d 623 (7th Cir. 1981)—reversing 483 F. Supp. 883 (N.D. Ill. 1979).**

The genesis of this case was the plaintiff's request for all documents relating to his complaint to the FBI that someone had wiretapped his telephone. Dissatisfied with the FBI's finding of no criminal conduct, and searching for documentary support for a possible civil suit, Miller brought an action under the FOIA. The district court held that the FBI could not invoke Exemption 7(D) for all of the confidential source information in Miller's files because it had not shown sufficient reasons to justify findings that implied assurances of confidentiality had been given to the sources. It also ruled against the FBI on Exemption 7(C), finding the privacy interests of FBI special agents and third parties mentioned in the files to be insubstantial when measured against the public interest in plaintiff's "watchdogging" of the FBI and his pursuit of a remedial lawsuit.

In reversing the lower court on each of these issues, the U.S. Court of Appeals for the Seventh Circuit recognized the sensitivity of the interests protected by Exemptions 7(C) and 7(D) in FBI criminal investigations. Regarding Exemption 7(D), the court of appeals held: "Unless there is evidence to the contrary in the record, we believe such promises of confidentiality are inherently implicit in FBI interviews conducted pursuant to a criminal investigation." The court of appeals found that such a holding is necessary to protect both the individuals interviewed in this case as well as the efficacy of future FBI criminal investigations.

The court of appeals also completely rejected the lower court's Exemption 7(C) analysis, finding that neither Miller's "watchdog" activities nor his purported need for discovery for his private lawsuit were the sort of factors which warrant the invasion of third parties' privacy. The court of appeals observed in this connection that the litigious and complaining nature of the plaintiff would itself likely lead to the sort of harrassment from which FBI special agents and third parties deserve protection.

***Doyle v. Department of Justice*, No. 80-2121 (D.C. Cir., Nov. 6, 1981)—affirming 494 F. Supp. 842 (D.D.C. 1980).**

If an award were to be given to the most audacious FOIA plaintiff, John Christopher Doyle probably would send an emissary to claim it. Doyle was convicted in 1965 of a Securities Act violation, but jumped bail and fled from the United States to avoid imprisonment. From his new home in the Republic of Panama, he then sought records from the Department of Justice concerning his conviction. The Department refused to process his request and Doyle, through his attorney, brought a FOIA suit, arguing that the "any person" language of 5 U.S.C. §552(a)(3) overrode his fugitive status. After observing that "[T]he hands of this plaintiff are sullied with his contempt for the tribunal whose assistance he is seeking to invoke," the district court dismissed the case under its broad equitable power to withhold access to the courts from those who flout the law. In a *per curiam* opinion, the U.S. Court of Appeals for the District of Columbia Circuit affirmed the dismissal, stating that so long as a fugitive continues to evade federal authority, "it is the general rule that he may not demand that a federal court service his complaint."

In a related FOIA case, *Javelin International Ltd. v. Department of Justice*, Civil Action No. 81-1111 (D.D.C., Dec. 9, 1981), the district court found that the ostensible plaintiff (Javelin) was actually acting as Doyle's agent. It accordingly dismissed the suit for the reasons stated above. Although Javelin's president denied that its request was made on behalf of Doyle, the district court was not persuaded. It noted that the two requests were identical, that Javelin's request was made only 11 days after Doyle's request was turned down, that the same counsel represented both parties and that Doyle was the largest individual shareholder of Javelin, as well as its founder, past president, director and chairman of its executive committee. The district court concluded by stating that to hold other than that Javelin was acting as Doyle's agent "would be blinking reality."

Supreme Court Update

In an extraordinary procedural development, the plaintiff in a case pending before the Supreme Court withdrew its FOIA request literally on the eve of the Court's consideration of the first appellate FOIA decision to order classified information disclosed.

The Supreme Court was scheduled on Feb. 19 to consider the government's petition for *certiorari* in *Holy Spirit Ass'n v. Central Intelligence Agency*, 636 F.2d 838 (D.C. Cir. 1980), a case in which the U.S. Court of Appeals for the District of Columbia Circuit upheld a lower court's rejection of the CIA's Exemption 1 claims for certain "Koreagate" investigation documents.

On Feb. 18, however, plaintiff's counsel delivered to the Supreme Court a letter withdrawing the FOIA request underlying the controversy and presumably mooting the appeal. In response, the Solicitor General formally asked the Court to vacate the D.C. Circuit's decision on the issue and on March 8 the Court did so.

In other developments, the Court on Feb. 24 issued its decision in *Baldrige v. Shapiro*, 50 U.S.L.W. 4227 (U.S., Feb. 24, 1982), holding unanimously that census data is exempt from disclosure under Exemption 3 of the FOIA and is also privileged from production in civil discovery. In so doing, the Court reversed a contrary ruling by the U.S. Court of Appeals for the Third Circuit, published at 636 F.2d 1210, and affirmed a Tenth Circuit ruling published at 644 F.2d 844.

Still pending before the Court is *Abramson v. Federal Bureau of Investigation*, 658 F. 2d 806 (D.C. Cir. 1980), *cert. granted*, No. 80-1735 (U.S., June 15, 1981), where the issue is whether information extracted from an FBI record and recompiled for an arguably non-law enforcement purpose loses its Exemption 7 protection. (See *FOIA Update*, Sept. 1981.) The Court heard oral argument on Jan. 11 and a decision is expected by the end of the Court's current Term.

No oral argument date has yet been set in *Washington Post Co. v. United States Department of State*, 647 F.2d 197 (D.C. Cir. 1981), *cert. granted*, No. 81-535 (U.S., Nov. 9,

Cont'd next page

Justice Offers New Training Course

The Legal Education Institute (LEI) of the Justice Department's Office of Legal Education has initiated a new interagency seminar on information law designed for both attorneys and paralegals.

The new seminar, entitled Information Law for Attorneys and Paralegals, was developed by LEI with the assistance of information law experts from several federal agencies and in coordination with the Justice Department's Office of Information and Privacy.

Karen Sherman, director of LEI, said that the new course is designed to enhance participants' knowledge of information law and is not intended as an introduction to the area. She said that attorneys and paralegals work closely together on information law matters and can benefit from a joint training seminar.

The agenda for the two-day seminar includes overview lectures on both the Freedom of Information Act and the Privacy Act of 1974, as well as lectures on administrative appeals practices, *Vaughn* indices, and recent litigation and policy developments. Additionally, several different workshops on various FOIA exemptions and procedures are included in the agenda and participants have the opportunity to select the workshop subjects which meet their particular needs.

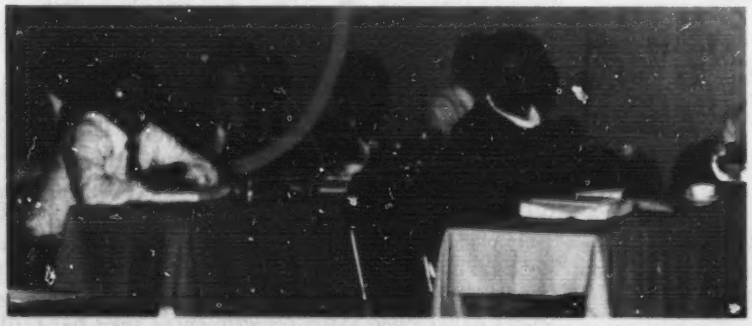
LEI offered the new information law seminar for the first time in February and a second session has just been concluded. The demand for the course was so great that LEI has scheduled three additional seminars for 1982. The dates for these sessions, all to be held in Washington, D.C., are May 18-19, August 18-19, and Nov. 16-17. Nominations of participants must be submitted to LEI no later than three weeks prior to each session. As with all LEI courses, there is no tuition charge.

The faculty for the information law seminars is drawn from several federal agencies. It includes: Russell M. Roberts (Health and Human Services); Cecelia E. Wirtz (Office of Management and Budget); Edward C. Shomaker (Nuclear Regulatory Commission); Joseph M. Levine (Commerce); Bruce L. Moyer (Merit Systems Protection Board); L. Jeffrey Ross (Agriculture); Blair P. Hall (State); Cheri L. McCracken (Federal Emergency Management Agency); and Douglas S. Wood, John Oliver Birch, and Susan A. Nellor (Justice).

Also among the faculty are nine members of the Justice Department's Office of Information and Privacy: Kathryn M. Braeman, Phyllis L. Hubbell, Margaret A. Irving, Joan E. Smiley, Yvette P. Rhodes, Ana B. Montes, Miriam M. Nisbet, Charles J. Sheehan, and Daniel J. Metcalfe. Members of the LEI team, in addition to Ms. Sherman, are Pamela Maida, Yvonne Jones, and G. Michael Lennon, the course director.

LEI develops and conducts many other legal education programs for attorneys and other legal personnel in the executive branch of the federal government. Among the courses to be offered by LEI during 1982 are: Advocacy Skills: Direct, Cross and Expert Witness Examination; Defensive Litigation; Equal Employment Opportunity: Class Actions and Statistics; Ethics Considerations for the Government Attorney; Law of Federal Employment: The Agency Perspective; and Legal Research Refresher for Paralegals. Further information may be obtained by writing to the Legal Education Institute, Department of Justice, 521 12th St., NW, Suite 406, Washington, D.C. 20530, or by calling the LEI Office at (202) 724-7827 or (202) 673-6372.

OIP's Kathryn M. Braeman Addresses LEI Session



Participants at LEI Seminar

Supreme Court Update

Cont'd from page 5

1981), which raises the issue of the proper breadth of the term "similar files" in Exemption 6. (See *FOIA Update*, Dec. 1981.) On Feb. 22, however, the Court denied a motion by the Post to have *certiorari* withdrawn, so the appeal is now ready for an argument date to be set in late March.

In addition to the FOIA cases accepted for review this Term, the Supreme Court handed down a FOIA-related decision on Dec. 1, 1981. In *Weinberger v. Catholic Action of Hawaii/Peace Education Project*, 50 U.S.L.W. 4027 (U.S., Dec. 1, 1981), the Court held that the Navy is not required to prepare an environmental impact statement for the possible storage of nuclear weapons at a specific facility because "...whether or not nuclear weapons are stored at [the facility] is classified information exempt from disclosure to the public under Exemption 1."

FOIA Training Opportunities

U.S. DEPARTMENT OF JUSTICE

Legal Education Institute
(8-724-7827/673-6372)

- INFORMATION LAW FOR ATTORNEYS AND PARALEGALS
  May 18-19 Washington, D. C.
  August 18-19 Washington, D. C.
  Nov. 16-17 Washington, D. C.

Open to any attorney or paralegal in federal employment.

Paralegal Training
(Alex Bartning 8-724-7492)

- INFORMATION PROCESSES $90
  May 9-11 Washington, D.C.

Open to those outside DOJ on a space-available basis.

USDA GRADUATE SCHOOL
(Debbie Mitchell 8-447-3247)

- IMPLEMENTATION OF FOIA AND PRIVACY ACT FOR FOI/PA ADMINISTRATIVE PERSONNEL
  May 27-28

600 Maryland Ave., SW, Room 108, Washington, D.C. 20024

OFFICE OF PERSONNEL MANAGEMENT

—IN WASHINGTON, D.C.

Supervisory and Communications Training Center
(Stanley Betterman 8-254-3211)

- FOIA AND PA WORKSHOP FOR ADMINISTRATIVE AND SECRETARIAL PERSONNEL
  July 19-20

Thomas Circle Training Center, 1121 Vermont Ave., NW, Washington, D.C. 20005.

- SUCCESSFUL IMPLEMENTATION OF FOIA/PA
  May 17-18

Thomas Circle Training Center, 1121 Vermont Ave., NW, Washington, D.C. 20005.

Government Affairs Institute
(8-632-5662)

- 4th ANNUAL SYMPOSIUM ON THE FREEDOM OF INFORMATION ACT AND THE PRIVACY ACT $250
  August 12-13

Location will be announced later.

—IN THE REGIONS

New England Regional Training Center
(Dan Buckley 8-223-5786)

- IMPLEMENTATION OF PRIVACY ACT AND FREEDOM OF INFORMATION ACT $165
  June 29-30 Boston, MA

Rocky Mountain Regional Training Center
(Paul Walker 8-234-2304)

- FREEDOM OF INFORMATION AND PERSONAL PRIVACY $110
  June 1-2 Denver, CO

Northwest Regional Training Center
(John Malloy 8-399-7904)

- FREEDOM OF INFORMATION AND PRIVACY ACT WORKSHOP $125
  May 4-5 Portland, OR
  August 16-17 Seattle, WA

Southwest Regional Training Center
(Yvonne Lindholm 8-729-8241)

- FREEDOM OF INFORMATION AND PRIVACY ACT WORKSHOP $155
  April 20-22 Dallas, TX

Southeast Regional Training Center
(Mel B. Hayden 8-242-5193)

- FREEDOM OF INFORMATION AND PRIVACY ACTS $125
  June 2-3 Atlanta, GA

FEDERAL BAR ASSOCIATION
(202) 638-0252

- 8TH ANNUAL CONFERENCE ON OPENNESS IN GOVERNMENT
  March 16 Washington, D.C.

ASAP Elects New Officers

Catherine C. McMillan, director of public disclosure for the U.S. Synthetic Fuels Corp., is the new president of the American Society of Access Professionals (ASAP). Ms. McMillan is a former employee of the Department of Justice.

Other officers elected for 1982 are Col. William C. Goforth, Defense Privacy Board, vice president; Beth M. Winston, Health and Human Services, secretary; and Edward C. Shomaker, Nuclear Regulatory Commission, treasurer.

Newly-elected members of ASAP's board of directors are Marilyn S. McLennon, Commerce (two-year term); Kathy W. Semone, Merit Systems Protection Board (one-year term); Robert L. Saloschin, retired director of the Office of Information Law and Policy (two-year term); and Deborah Drosnin, editor of *Access Reports* (one-year term). Russell M. Roberts, FOIA officer at Health and Human Services and first president of ASAP, also will serve for one year on the board.

Catherine C. McMillan
New ASAP President

Committee chairpersons for 1982 are Ms. Semone (Membership); Nancy T. Cherry, National Institutes of Health, and Betsy Knauff, Department of Treasury (Professional Standards); Bruce L. Moyer, Merit Systems Protection Board, and Gerald D. Sturges, Office of Congressman Obey (Legislative); Hugh V. O'Neill, HHS, and Col. Goforth (Training); Mr. Roberts and Michael P. Persico, Equal Employment Opportunity Commission (Program); and Carl C. Coleman, HHS (Publicity).

ASAP was formally organized in October of 1980 and its membership grew to 300 by the end of 1981. Members include attorneys, paralegals, public affairs specialists, management analysts, and others interested in federal access laws. Additional information may be obtained from Ms. Semone at (202) 653-7200.

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FOIA/PA Training Needs Survey

Job Title: _____ **Agency:** _____

Degree of FOIA/PA involvement: ☐ Full-time ☐ Part-time ☐ Only Occasional

Have you had FOIA/PA training? ☐ Often ☐ Occasionally ☐ Never

If so, where? _____

Course Title(s): _____

Which formats have you found to be most helpful? ☐ All Day ☐ Half Day

☐ Workshops ☐ On-the-job Training ☐ Lectures
☐ Seminars ☐ Self-teaching Materials ☐ (Specify) _____

What level of training is most needed? ☐ Introductory ☐ Advanced ☐ Updating

In which areas would you like to receive training?

☐ Administrative Procedures
☐ Classification Review
☐ Protection of Business Data
☐ Agency Deliberative Records
☐ Interagency Exchange of Records
☐ Protection of Personal Privacy
☐ FOIA/PA Interface
☐ Fees: Calculation, Waiver
☐ Law Enforcement Records
☐ Redaction of Records
☐ Privacy Act
☐ Recent Developments

Have you used *FOIA Update* in training? ☐ Often ☐ Occasionally ☐ Never

If so, how has it been helpful? _____

How could it be improved? _____

What other materials have been helpful? _____

What other materials would you like to see developed? _____

Name (optional) and additional comments: _____

_____

The Department of Justice is attempting to ascertain the training needs of federal agency employees who work with the Freedom of Information Act and/or the Privacy Act of 1974. Please feel free to copy the above form and circulate it within your agency to other access professionals. Forms should be returned to the Office of Information and Privacy, Room 6345, Main Justice Building, Washington, D.C. 20530, before April 30. Your cooperation is appreciated.

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Vol. III, No. 3
June 1982

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FOIA UPDATE

New Features

• In this issue, *FOIA Update* inaugurates a new feature, "FOIA Counselor Q & A" (page 5), drawn directly from the "FOIA Counselor" function performed by the Office of Information and Privacy. Each week, OIP attorneys respond to approximately two dozen telephone inquiries (at FTS 724-7400) from agency personnel seeking guidance on FOIA-related matters. Beginning in this issue, *FOIA Update* will publish selected questions and answers of particular significance.

• Another new feature in this issue is "FOIA Focus" (page 11), which will spotlight representatives of the many different employee groups who work with the FOIA: attorneys, document analysts, paralegals, program managers, public disclosure officers, etc. The subject of the first "FOIA Focus" is 16-year veteran attorney Leonard Schaitman, who is perhaps the most senior career federal employee in the FOIA area and across whose desk passes almost every FOIA case to reach the appellate court level. Suggestions for subjects of "FOIA Focus" may be sent to the managing editor.

Senate Committee Approves Broad FOIA Reform Bill

The Senate Judiciary Committee on May 20 unanimously approved the Freedom of Information Reform Act, a comprehensive FOIA revision supported by the Administration. The Judiciary Committee's action, by a vote of 17-0, came after several weeks of intense negotiations which, in the end, unified the committee in support of a broad FOIA reform package.

Senator Orrin Hatch (R-Utah), chairman of the Judiciary Committee's Subcommittee on the Constitution, led the efforts in steering the reform bill, S. 1730, through the subcommittee and committee levels. The marked-up bill is an amalgam of proposals introduced by Senator Hatch and the Administration last year, with some modifications reflecting the concerns of Senator Patrick Leahy (D-Vt.), who served as spokesman for the views of various public interest and media groups on the bill.

Joining with Senators Hatch and Leahy in refining the bill for committee approval were two other members of the Constitution Subcommittee, Senators Dennis DeConcini (D-Ariz.) and Charles Grassley (R-Iowa). Their combined efforts ensured strong bipartisan support for a broad FOIA reform measure.

The bill is now expected to reach the Senate floor by mid-summer, where its broad support should lead to passage by the full Senate with no more than slight refinement. It would then move for consideration to the House of Representatives where Rep. Glenn English, chairman of the House Subcommittee on Government Information and Individual Rights, is awaiting full Senate action before commencing FOIA reform efforts there.

Senator Leahy has publicly committed himself to urge House Democrats to support the bill marked up by the Senate Judiciary Committee. While the timing of future House action is not yet certain, Senator Leahy's backing of the bill should promote a positive reception on both sides of the aisle there.

The marked-up bill would make comprehensive changes in existing law, including the following:

Fees and Waivers: Similar to earlier versions, the new bill would authorize the Office of Management and Budget to issue guidelines aimed at developing a uniform schedule of fees and processing procedures for all agencies. Under the bill, agencies could charge fees for "all costs reasonably and directly attributable to" search, duplication and other FOIA processing activities. No fee would be charged whenever the costs of routine fee collection and check processing would be likely to exceed the amount of the fee itself. Half of all fees collected would be retained by agencies to fund their FOIA operations. In addition, an agency could charge the fair market value for commercially valuable technological information generated or purchased by the Government at substantial cost.

Fee waivers for search and duplication charges would be authorized only

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Legislative Update

... FOIA Bill Unanimously Approved

when, as under existing law, an agency determines that it is in the public interest to furnish the information. New processing charges would be subject to waiver for various types of public interest groups, providing that the agency determines that the information is not requested for a commercial use.

Time Limits: This section of the marked-up bill retains the 10-working-day time limit provision in existing law, but would allow agencies to take 30-working-day extensions in "unusual circumstances." Similar to the earlier proposals, the new bill would broaden the definition of "unusual circumstances" to include new categories of such circumstances.

The bill retains the provision that a court may grant an agency additional time to process requests when "exceptional circumstances" exist and it contains new language providing that an agency shall not be considered to have violated the Act's time limits unless and until a court rules on the matter.

Exemption 2: Under the bill's broadening of Exemption 2, manuals and instructions to investigators, inspectors, auditors or negotiators would be exempt "to the extent that disclosure...could reasonably be expected to jeopardize" their activities. Comparable new protection would apply to examination materials.

Exemption 6: The new bill significantly broadens protection of personal privacy by exempting any "record or information concerning individuals...the release of which could reasonably be expected to constitute a clearly unwarranted invasion of personal privacy." The bill also would provide express protection for mailing list-related data.

Exemption 7: Under the marked-up bill, Exemption 7 protections are also significantly enhanced. The threshold language of the exemption would have it apply to "records or information compiled for enforcement purposes" and the subparts would protect such information which: "could reasonably be expected to interfere with enforcement proceedings," under Exemption 7(A); "could reasonably be expected to disclose the identity of a confidential source," including institutional sources, under Exemption 7(D); or "could reasonably be expected to endanger the life or physical safety of any natural person," under Exemption 7(F). The bill would also substantially expand the protection of Exemption 7 (E) by having it expressly cover guidelines and procedures for law enforcement investigations and prosecutions.

Organized Crime: The bill also contains a special five-year exclusion for documents generated in investigations of organized crime designated by the Attorney General. The exclusion could be extended for three additional years or even shortened if the agency determined that there was an "overriding public interest" in doing so. In a similar provision, the bill also maintains the subcommittee's special exclusion for informant records when sought by third parties.

Additional Exemptions: The newly marked-up bill provides for two additional exemptions. Similar to the subcommittee version, in new Exemption 10 the bill exempts from disclosure technical data covered by federal export laws. Exemption 11 would exempt from release records or information maintained or originated by the Secret Service in connection with its protective functions.

Proper Requests: The Judiciary Committee bill would establish three distinct limitations on the use of the FOIA. Freedom of Information Act requests could be filed only by United States citizens and aliens lawfully admitted for permanent residence. Use of the Act by felons could be limited or even flatly prohibited by regulations promulgated by the Attorney General. Additionally, the marked-up bill maintains a prohibition on FOIA requests for records available through discovery in ongoing judicial or administrative proceedings.

Business Confidentiality Procedures: S.1730 would establish an administrative scheme by which submitters of business information could be guaranteed full notice and objection rights whenever their data are requested under the FOIA. (Current agency practices are the subject of policy guidance appearing on page 3 and a survey feature appearing on pages 4-5 of this issue of *FOIA Update*.)

Submitters would be required to designate at the time of submission any information that, in their view, would be exempt as trade secret or confidential business information. With certain limited exceptions, an agency would be required to notify the submitter of the receipt of a FOIA request within 10 working days. A submitter would then have the right to submit written disclosure objections to release of information within 10 days of receipt of such notice.

The bill further requires that when an agency notifies a submitter of a FOIA request, the agency must also notify the requester that the notice provision is in effect. Both submitter and requester would have to be notified of the final agency decision, and the agency would be prohibited from making any disclosure for 10 working days. The agency's action on both the FOIA request and the submitter's objections would be subject to *de novo* judicial review.

Other Matters: Not included in the bill as marked up by the Judiciary Committee is a new version of Exemption 4, the exact formulation of which has been the subject of great controversy. That issue, together with the special protection of "terrorism-related" records and of settlement information, was reserved for possible consideration on the Senate floor.

FOIA UPDATE

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U.S. Department of Justice
Office of Information and Privacy

FOIA UPDATE

OIP Guidance: Submitters' Rights

The free flow of useful information into administrative agencies is essential to the operation of the Federal Government. To perform its regulatory and other administrative functions effectively, the Government requires the submission of millions of items of information annually from the private sector. Much of this information is submitted by corporations or other business entities and consists of trade secrets or other commercially valuable data.

Federal agencies have a responsibility to protect such sensitive business information from disclosure and they may do so pursuant to Exemption 4 of the Freedom of Information Act (FOIA), 5 U.S.C. §552(b)(4). In order to ensure that the vital flow of such information is not impeded, agencies should exercise this responsibility to the fullest and with great care.

In 1979, the Supreme Court issued a landmark decision in this area, *Chrysler Corp. v. Brown*, 441 U.S. 281 (1979), in which it held that submitters of business information may sue under the Administrative Procedure Act, 5 U.S.C. §§701, *et seq.*, in so-called "reverse" FOIA lawsuits to enjoin agencies from disclosing their information in response to FOIA requests. The procedure established by the Supreme Court for the litigation of such matters, however, made it imperative that business submitters be afforded a full opportunity to state their disclosure objections to the agencies for consideration at the administrative level.

To alert agencies to this litigation imperative, and to encourage the establishment of sound administrative practices in this area, the Department of Justice issued two guidance memoranda on this subject in June 1979. In one, the Department's Civil Division formally advised all agency general counsels of the procedures to be followed in connection with "reverse" FOIA cases. *See* Memorandum From Assistant Attorney General Barbara Allen Babcock To All Agency General Counsels, dated June 21, 1979, *reproduced at* PH Gov. Disclosure Service, Vol. 1, ¶300,791 (1979), *summarized at* 48 U.S.L.W. 2011-12 (July 3, 1979). In a companion guidance memorandum, the Department's Office of Information Law and Policy (a predecessor office to the Office of Information and Privacy) generally emphasized that all agencies should afford business submitters timely notice and a full opportunity to object to any possible disclosure of submitted business information. *See* Memorandum From Office Of Information Law And Policy Director Robert L. Saloschin To All Federal Departments And Agencies, dated June 15, 1979, *reproduced at* PH Gov. Disclosure Service, Vol. 1, ¶300,789 (1979).

Recently, however, it has come to the attention of the Department of Justice that there is need for substantial improvement in the notice and objection procedures made available to submitters of business information. A recent Office of Information and Privacy survey of administrative practices in this area revealed that several agencies still have no formal procedures for providing submitters with full notice and objection rights and that even many agencies which have formal practices in this area do not ensure that they are followed in all instances. As a result, there is widespread concern within the business community that submitted business information is not universally receiving the protection that it requires, which in turn has led to a growing reluctance among business submitters to provide valuable information to many federal agencies.

In light of these considerations, and pursuant to the Department of Justice's government-wide FOIA implementation responsibilities under 5 U.S.C. §552(d), the Office of Information and Privacy, in coordination with the Presidential Task Force on Regulatory Relief, issues the following specific guidance to all federal agencies in possession of submitted business information. All such agencies should:

- **Provide business submitters with prompt written notice of any FOIA request for submitted information (unless it is readily determined by the agency that the information should not be disclosed or, on the other hand, that the information lawfully has been published or otherwise made available to the public).**
- **Afford business submitters a period of at least ten working days in which to object to the disclosure of any specified portion of the information and to state fully all grounds upon which disclosure is opposed.**
- **Give careful consideration to all such specified grounds for nondisclosure prior to making an administrative determination of the issue and, in all instances in which the determination is to disclose, provide the submitter with a detailed statement of the reasons for which its disclosure objections are not sustained.**
- **Provide business submitters with written notice of any final administrative disclosure determination not less than ten working days prior to a specified disclosure date, in order that the matter may be considered for possible judicial intervention.**
- **Notify business submitters promptly of all instances in which FOIA requesters bring suit seeking to compel disclosure of their information.**
- **Establish formal written procedures, preferably by regulation, according to which the above steps are to be followed agency-wide in all instances.**

These should be the fundamental elements of each agency's program to ensure proper protection of all submitted business information in its possession. Business submitters are entitled, at a minimum, to these basic rights of formal notice and a full opportunity to object to the disclosure of their information. The Administration is attempting through its proposed FOIA reform legislation to establish these submitters' rights within the FOIA itself; but until such reform is enacted it is still, as District Court Judge Gerhard A. Gesell recently phrased it, "[t]he better practice... obviously" to follow such procedures. *British Airports Authority v. United States Department of State*, 530 F. Supp. 46, 50 (D.D.C. 1981). Only through the full and careful compliance with such procedures by all agencies in possession of submitted business information in all instances can the vital flow of valuable commercial information from the business community to the Federal Government be maintained.

OIP Survey: Submitter Notice Practices

A survey of 50 major Federal Government agencies recently undertaken by the Office of Information and Privacy revealed that while it is the prevailing practice across the Government to notify and consult with the submitters of business information before deciding whether to release documents requested under the Freedom of Information Act, most agencies do not routinely notify submitters if they do not contemplate release as a possibility. Additionally, not all agencies have regulations or even formal guidelines governing such notice and consultation procedures. (See page 3 of this issue of *FOIA Update* for official policy guidance.)

Among agencies which do notify submitters of all FOIA requests—whether or not release is contemplated—are the Department of Defense, the General Services Administration, the Department of Transportation, and the Federal Emergency Management Agency.

The OIP survey found that 12 agencies have regulations which require them to notify/consult with submitters before releasing information, that two agencies follow a procedure spelled out by the Department of Justice in 1979 guidance memoranda, and that others have less formal procedures or long-standing practices which aim at consultation with the submitter before release. Several agencies do not necessarily notify and consult with submitters, at least not for all agency components or in all cases.

Agencies which do not have regulations in force follow a variety of approaches, although the result is usually the same: agency personnel give the submitter the opportunity to substantiate its position that material should be withheld or to agree that documents are not confidential before moving forward with release.

As a general matter, agency personnel readily agree that it is only sensible and fair to consult the submitter before making a release. For agencies possessing quantities of Exemption 4 material the consultation process undeniably adds days to the FOIA processing period, may involve extensive photocopying and even multiple copying of documents, and can end up pitting the submitter against the requester with the agency in the middle.

The OIP study revealed that one agency, the Food and Drug Administration, takes the position, by regulation, that it possesses the expertise to determine whether information is properly withholdable as confidential commercial information or a trade secret—without the necessity of any notice to, or consultation with, the submitter. The FDA publishes a daily log of FOIA requests which is available to submitters and, not surprisingly, the log is closely monitored. FDA regulations do provide for consultation when the agency determines that the issue of confidentiality is in doubt.

Agencies most heavily involved with business information include the Department of Labor and its components which monitor contracts, inspect businesses and industries, and compile labor statistics.

Department of Labor

Sofia Petters, counsel for administrative legal services in the Department of Labor's Office of the Solicitor, says that the department and its many offices and bureaus "early on got into a system of checking with the submitter.... We take the position that we might not be able to tell if competitive harm is involved, so we check...."

Of the three Labor components most heavily involved with business information, only the Office of Federal Contract Compliance Programs has formal regulations setting forth a procedure for consulting with the submitter. Similar but less formal procedures are followed throughout the department.

The standard practice at Labor is to notify a submitter only when it is not clear that the submitter's request for confidential treatment can be honored. DOL personnel write the submitter informing it that there has been a FOIA request and asking for comments either supporting withholding or agreeing to disclosure. The submitter then has 5 to 10 days to respond. Under Labor's practices, the submitter also has a 10-day time period in which to seek judicial intervention if the department decides that it cannot withhold the material.

Ms. Petters says that this area can present tremendous problems for her department because there are often strong arguments both for and against release and DOL personnel often find themselves in the middle. Another difficulty is the massive quantity of records which must be handled and reviewed before release can be made. Ms. Petters says she also finds the entire area of legitimate concern to the business community. "There are pockets of problems here," she acknowledges.

Department of Health and Human Services

At the Department of Health and Human Services, regulations establishing a "notice-to-submitters" procedure were adopted in early 1982, thus converting to formal procedure what had been only an informal practice for many years.

According to the regulations, whenever there is a FOIA request for contract or procurement information, HHS officials are required to consult with the submitter of the material "if there is reason to believe the source may object to release of the record or part of the record." The submitter must provide its justification for withholding material within five working days. Once the decision is made to release, the submitter will receive a copy of the material as proposed for release. The submitter then has five working days to take further action.

Russell M. Roberts, FOIA officer at HHS, says that this procedure appears to work well, but notes that notification and review is a long and costly process for submitters. He has been told that some business submitters are considering adding the cost of the process to their bids on Government contracts.

From the agency point of view, Roberts says it is likewise burdensome for an agency to be caught between two opposing businesses. He suggests that there be some sort of corrective legislation in this area to allow agencies to process these requests in a fairly mechanical way. Should the requester then bring suit, the submitter should be joined with the agency in the suit, he says.

Agencies with Regulations

Of the agencies with regulations governing notice and consultation procedures, most—like the Consumer Product Safety Commission, the

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Are "personal notes" maintained by an agency employee subject to FOIA disclosure?

Because the FOIA applies only to agency records, "personal notes" maintained by an agency employee should not be subject to FOIA disclosure. Unfortunately, the terms "agency record" and "personal notes" are not adequately defined. Therefore, issues involving the applicability of the FOIA to "personal notes" must be decided on a case-by-case basis. Surprisingly, there have been very few such cases litigated. One case recently decided, however, suggests the factors that courts may consider in determining the status of "personal notes." The documents at issue in *British Airports Authority v. CAB*, 531 F. Supp. 408, 412 (D.D.C. 1982), were handwritten notes made by an employee solely for use in preparing a memorandum for other agency officials. In holding that such notes were *not* agency records subject to the FOIA, the court emphasized that they were personal in nature, that the employee need not have created them, that he intended them not to be permanent, and that he kept them in his personal desk files with no intent to distribute them. *See also Porter County Chapter of Isaak Walton League v. AEC*, 380 F. Supp. 630, 633 (N.D. Ind. 1974) (handwritten materials created by agency employees for their own purposes while executing employment responsibilities not "agency records" under FOIA).

What rights do foreign nationals have under the Freedom of Information Act?

Under existing law, foreign nationals have the same rights of access under the Freedom of Information Act as do United States citizens. The only point of difference in this regard is that when an agency advises a foreign national requester of his right to review in federal district court, he need not be advised that he can bring suit in a judicial district of his residency (unless he has been lawfully admitted for permanent residence). By contrast, the Privacy Act of 1974 limits its access rights to United States citizens and aliens lawfully admitted for permanent residence. *See, e.g., Raven v. Panama Canal Co.*, 583 F.2d 169, 170 (5th Cir. 1978), *citing* 5 U.S.C.§552a(a)(2), *cert.denied*, 440 U.S. 980 (1979).

When a record requested under the FOIA is found in the files of one agency but was originated in another agency, which agency (1) is responsible for responding to the request, and (2) is the proper party defendant in a lawsuit brought to compel disclosure of the record?

When an agency receives a FOIA request, it typically refers any requested documents originating with other agencies to those agencies for processing. The rationale behind this is at least two-fold. First, such referral saves time. The originating agency is presumably more familiar with the material and can therefore process its own records faster and more effectively. Indeed, if the custodial agency were to process the records itself it would probably have to consult with the originating agency. The second reason is limited to those cases involving classified material. Because in most instances only the originating agency has the authority under the Executive Order to review and declassify documents which it classified, the custodial agency would be incapable of responding to the request.

For these reasons, the law is now clear that only the originating agency is a proper party defendant in a lawsuit brought to compel disclosure of records it generated. *See, e.g., McGehee v. CIA*, 533 F. Supp. 861, 869 (D.D.C. 1982) (in suit against CIA, court dismissed action as it pertained to documents originating in State Department and FBI because those agencies had not been made parties to the suit); *British Airports Authority v. CAB*, 531 F. Supp. 408, 418 (D.D.C. 1982) (in suit against CAB only, court lacked jurisdiction over document which originated with State Department). For a further discussion of these issues, see Strickland and Wood, "Agency Processing Of FOIA Requests For Records That It Did Not Originate," PH Gov. Disclosure Service, Vol. 1, ¶7018.

... Agency Practices Examined

Securities and Exchange Commission, and the U.S. Synthetic Fuels Corp.—provide for records to be designated as confidential at the time of submission. Some agencies, such as the Commodity Futures Trading Commission, provide for submitters to file a formal petition for confidential treatment at the time of submission.

Most agencies do not make determinations of confidentiality until a FOIA request is received. Then, if the staff personnel do not agree with the submitter's confidentiality claim, the submitter is consulted and has an opportunity in which to provide further evidence of confidentiality.

The Environmental Protection Agency does some initial evaluation of requests for confidential treatment. Regulations of the Office of the Federal Inspector for the Alaskan Natural Gas Pipeline (OFI) provide for designation of material as either "business" or "sensitive." The OFI, describing "sensitive" as a narrow category, agrees in advance to "resist disclosure" of sensitive records. Submitters of "business" information are notified before a release is made and would have the opportunity to object.

General Practice Elsewhere

The OIP survey found that approximately 20 agencies have only informal notification procedures ranging from the precise to the casual. Included in the group are a number of Cabinet-level departments.

At one agency, there exists no formal practice whatsoever as to how to handle business material. Personnel at the agency's headquarters admit that they are uncertain as to how field and regional offices approach the problem. It was found that personnel at many agencies believe that practices in the field and at regional offices may vary from the Washington norm simply due to the numbers of offices and because, as a rule, practices tend to be "just a little more informal" away from headquarters whenever they are not governed by formal written guidelines.

Guest Article

An Overview of Executive Order 12356

By Gerald A. Schroeder

The new National Security Information Executive Order issued by President Reagan on April 2, E.O. 12356, includes a number of changes to Executive Order 12065, which it replaces, based on litigative and administrative experience under that predecessor order. These changes are designed to enhance the executive branch's ability to protect national security information from unauthorized or premature disclosure without increasing the quantity of classified information. The new order, 47 Fed. Reg. 14874 (April 6, 1982), becomes effective August 1.

In order for information to be classified under the new order, three requirements must be met. First, the individual classifying the document must be authorized to do so. Second, the information must fall within one or more specified categories of information. Third, the classifying official must determine that unauthorized disclosure of the information could reasonably be expected to cause damage to the national security. While these general requirements were present in the previous order, two changes have been made to improve the Government's ability to protect sensitive information.

First, the threshold standard for classification of information as "confidential" has been modified from "identifiable damage" to "damage." This was the standard used under Executive Order 11652, the predecessor to E.O. 12065. The reason for this change is to eliminate uncertainty regarding the intent of the term "identifiable." This language of the 1978 order was intended to remind classifiers that they should perform a conscious analysis of the damage to the national security that would flow from unauthorized disclosure. However, some litigants have contended that this language requires that the damage be of a particular type or degree in order to justify classification. In one lawsuit, for example, the plaintiff argued that disclosure of information identifying certain intelligence sources would not result in "identifiable" damage because the expected harm to these sources was merely speculative. No such application of the "identifiable damage" concept was intended, and yet each such assertion in court required a full explanation and response, thereby increasing the Government's litigative burden. This unintended burden will be eliminated by the new order.

Both the new order and the President's statement that accompanied it recognize that it is essential for American citizens to be informed....

The second change to the requirements for classification is the addition of several subject matter categories of information (*e.g.*, "cryptology" and "the vulnerabilities or capabilities of systems, installations, projects or plans relating to the national security") to the list of types of information that may be considered for classification. These additions, however, merely codify and clarify existing practice under the previous order and do not authorize classification of information that does not also meet other requirements.

Another departure from E.O. 12065 is the elimination of the so-called "balancing test." This test required that in deciding whether to declassify and release information otherwise meeting the requirements of the order, special consideration be given to whether the "public interest" in disclosure should be balanced against the damage to national security that could be expected to flow from disclosure. Both the new order and the President's statement that accompanied it recognize that it is essential for American citizens to be informed about their Government's activities. They also recognize, however, the nation's critical need to protect certain sensitive information when disclosure would harm the security of all Americans.

While the "balancing test" may be a laudable principle, including an explicit requirement in the executive order only invited others to substitute their judgment for that of executive branch officials possessed with the expertise and experience to exercise this responsibility. That invitation significantly complicated the task of protecting legitimately classified information in court and added no countervailing benefit to the public because no court has ever ordered information released under the balancing test.

The new order also removes the limits on the duration of classification. E.O. 12065 mandated that each original classification decision include a date or event for automatic declassification no more than six years later. Certain specified individuals could extend the declassification date or event or establish a date for declassification review beyond six years, but generally no more than 20 years after original classification. After 20 years, only an agency head could extend classification and then only in 10-year increments. This system and prior systems linking classification to arbitrary time frames did not significantly accelerate the declassification process but did increase the risk of premature disclosure of information that merited continued protection.

The new order allows classifiers to continue to establish specific dates or events for declassification where that is appropriate. Generally, however, it ties the duration of classification to the continued national security sensitivity of the information. Of course, declassification reviews will continue to be required whenever information is requested by any citizen under the mandatory review provisions of the order or the Freedom of Information Act and, generally, will also occur through a systematic review after 30 years.

Another change made by the new order is the addition of a requirement that, in cases of doubt as to classifiability or proper level of classification, the

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Written by Gerald A. Schroeder, a senior attorney in the Justice Department's Office of Intelligence Policy and Review, this overview of new E.O. 12356 was prepared in coordination with the Information Security Oversight Office, which holds responsibility for its implementation.

In one lawsuit, for example, the plaintiff argued that disclosure of information identifying certain intelligence sources would not result in 'identifiable' damage because the expected harm to these sources was merely speculative.

information be considered classified or classified at the higher level pending a final determination within 30 days by an original classification authority.

This requirement is a partial reversal of a provision in E.O. 12065 resolving cases of reasonable doubt against classification or against classification at the higher level, and has been widely reported in the news media to be a presumption of classification, which it is not. E.O. 12356 provides only that in cases of reasonable doubt the information should be protected until that doubt can be resolved. The director of the Information Security Oversight Office (ISOO) has explained its meaning as "when in doubt, find out." Since damage to national security from an erroneous disclosure is irreversible and application of this provision would merely delay for a short time the release of any information later determined not to warrant classification, this approach is a responsible one.

The new order also eliminates the prohibition against the reclassification of information previously declassified and released by providing that such information can be reclassified if it "may reasonably be recovered." This provision permits the Government to attempt to correct erroneous disclosures, but only where the information can be recovered from the person or persons to whom it was disclosed. Obviously, that would be impossible in the case of an erroneous disclosure to the general public. But when, for example, an erroneous release is made to a single FOIA requester, this new provision provides the Government with needed flexibility that it did not have under the previous order. This new authority, however, may only be exercised by the President and agency heads and officials designated by the President as original classification authorities. Such determinations must also be reported to the Information Security Oversight Office, which continues to have Government-wide oversight of the information security program under the new order.

One other major change to E.O. 12065 broadens the scope of the presumption that disclosure of certain types of information will cause damage to the national security. In addition to foreign government information and the identity of a confidential foreign source, unauthorized disclosure of intelligence sources and methods is also now presumed to cause damage to the national security. Expansion of the information covered by the presumption should aid litigators defending Freedom of Information Act suits involving this information.

It is also noteworthy that the term "confidential source" is now defined in the executive order, thus making clear that the identities of human sources who provide national security information to agencies outside the intelligence community should be protected through classification.

Executive Order 12356 also contains a number of less significant changes to the predecessor order. These changes include: (1) modification of the procedure for classifying information that has been requested under the FOIA and should have been classified previously—a determination by the agency head or deputy agency head is no longer necessary; (2) inclusion of specific authority, already recognized by the courts, to refuse to confirm or deny the existence of records in response to an access request if the fact of existence or nonexistence is itself classifiable; (3) specific recognition that disclosure of information may result in damage to the national security either by itself or in the context of other information (the "mosaic" theory of classification); and (4) establishment of a more cost-effective program for systematic review of permanently valuable classified records.

The new order retains existing prohibitions against using classification to conceal violations of law, inefficiency or administrative error, or to prevent embarrassment, or delay the release of information that does not require protection in the interest of national security. In addition, the prohibition on classification of basic scientific research information not clearly related to the national security continues as under E.O. 12065. Finally, all information to be classified must be owned by, produced by or for, or under the control of the United States Government.

As noted earlier, all of these changes are designed to better enable the Government to protect truly sensitive national security information—in court and otherwise—and to reduce unnecessary administrative burdens without permitting excessive classification. Steven Garfinkel, director of the General Services Administration's Information Security Oversight Office and the person responsible for monitoring compliance with the new order, says that the new order "keeps the lid on" the most important factors influencing the extent of classificiation:

> "In fact, our oversight experience shows that over the past decade the number of decisions to classify information is relatively constant. The most important variable is not the particular information security system in place, but rather the status of world affairs. For example, under the 1978 order that is being replaced, classification activity increased approximately ten percent between FY '79 and FY '80, largely because of the Iranian hostage crisis. Of the systemic variables that do affect the number of classification decisions, the most relevant are the number of persons authorized to classify information and the quality of program oversight. This order keeps the number of classifiers at its present total of approximately 7,000 persons worldwide, down 900 percent from just a decade ago, and retains the requirements for effective internal and external monitorship and training."

In conclusion, nothing in the new order is intended to permit the classification of additional material beyond that which was subject to classification under E.O. 12065.

***Greentree v. U.S. Customs Service*, 674 F.2d 74 (D.C. Cir. 1982)—reversing 515 F. Supp. 1145 (D.D.C. 1981).**

Refusing to follow the lead of two other circuits [*Painter v. Federal Bureau of Investigation*, 615 F.2d 689 (5th Cir. 1980), and *Terkel v. Kelly*, 599 F.2d 214 (7th Cir. 1979)], the U.S. Court of Appeals for the District of Columbia Circuit ruled that the Privacy Act of 1974 is not a FOIA Exemption 3 statute.

Frank Derek Greentree, convicted of attempting to import several tons of marijuana, sought access to Customs Service records concerning his activities. The district court held that the records sought were criminal justice records exempted under Privacy Act subsection (j)(2) from the access provision of that Act and that this caused the automatic triggering of Exemption 3 of the FOIA so as to warrant nondisclosure under the FOIA as well.

In overruling this interpretation, the D.C. Circuit held that the Privacy Act is not an Exemption 3 statute and that documents withheld from a first party requester must be independently exempt from disclosure under both the Privacy Act and the FOIA. The Solicitor General has determined not to seek Supreme Court review of this issue at this time, pending its further development in the lower courts.

***Grolier, Inc. v. Federal Trade Commission*, 671 F.2d 553 (D.C. Cir. 1982), *rehearing en banc denied*, April 7, 1982.**

By a two-to-one vote, a panel of the U.S. Court of Appeals for the District of Columbia Circuit limited the application of the attorney work-product privilege embodied in Exemption 5 to situations in which litigation related to that in which the records were prepared either is pending or could potentially exist.

In reaching such a novel holding, the D.C. Circuit found that three different approaches have been adopted in determining whether the work-product privilege extends after the termination of the litigation for which the records were prepared. It found that some courts have applied the privilege only to materials prepared for the suit then before them, that others have upheld perpetual protection, and that still other courts have extended work-product protection only in subsequent cases related to the original litigation.

The D.C. Circuit adopted the third approach, holding that, at least in the FOIA context, some potential for related litigation must be present to warrant protection for attorney work-product in terminated litigation. The Government's petition for rehearing *en banc* was denied by a 5-4 margin. The Solicitor General is considering petitioning for Supreme Court review.

***Martorano v. Department of Justice*, 3 GDS ¶82,344 (D.D.C., April 23, 1982).**

In what is perhaps the first decision construing the D.C. Circuit's new standard in *Grolier v. Federal Trade Commission*, Judge John Lewis Smith of the District Court for the District of Columbia found the attorney work-product privilege applicable to records more than six years old where they pertained to the plaintiff's criminal conviction. The documents at issue included a memo discussing responses to defense motions, as well as the prosecutor's handwritten notes concerning the plaintiff's then-pending trial. The Department of Justice argued that although the trial was over, the potential for related litigation continued because the plaintiff, still a federal prisoner, could collaterally attack his sentence or petition for a writ of habeas corpus. The court held that "the protection of the attorney work-product privilege is still necessary" under such circumstances.

***Playboy Enterprises v. Department of Justice*, 3 GDS ¶82,313 (D.C. Cir., May 11, 1982)—affirming in part, reversing in part 516 F. Supp. 233 (D.D.C. 1981).**

The report of a Justice Department task force looking into the activities of an FBI informant cannot be withheld in its entirety under the "deliberative process" prong of Exemption 5, according to the U.S. Court of Appeals for the District of Columbia Circuit. Playboy sought full disclosure of the report compiled in response to Congressional inquiries about the actions of Gary Thomas Rowe, an FBI informant in the Ku Klux Klan. The Government argued that the report, a synthesis of thousands of reviewed documents, reflected the "choice, weighing and analysis of facts," and was exempt in its entirety.

The D.C. Circuit held, however, that "a report does not become a part of the deliberative process merely because it contains only those facts which the person making the report thinks material." It distinguished and did not disturb an earlier case, *Montrose Chemical Corp. v. Train*, 491 F.2d 63 (D.C. Cir. 1974), by noting that the report in *Playboy* was prepared to inform the Attorney General of certain facts which he then summarized and relayed to members of Congress, whereas in *Montrose* summaries of lengthy factual hearings were prepared to assist the EPA administrator in arriving at adjudicatory decisions. The D.C. Circuit concluded that disclosure of the Justice Department report, unlike the EPA summaries, would not "allow inquiry into the decision-maker's mental processes." The Solicitor General is considering further apppeal.

***Yeager v. Drug Enforcement Administration*, 3 GDS ¶82,311 (D.C. Cir., May 14, 1982).**

In this decision, the U.S. Court of Appeals for the District of Columbia Circuit considered the extent to which an agency is required to employ its computer capabilities to fulfill its duty to segregate and release nonexempt material under the FOIA. The plaintiff conceded that the data he sought was exempt in its existing form under various subparts of 5 U.S.C. §552(b)(7), but he argued that the information should be "compacted" in order to be nonexempt and segregable for release. ("Compacting" is a computer programming "disclosure avoidance technique" used to reformulate computerized statistical information into a condensed form which does not permit identification of specific individuals.) The plaintiff reasoned that "compacting" is simply another method of deletion and therefore is required by the segregation provision of the FOIA.

Rejecting this argument, the D.C. Circuit declared: "We are not persuaded that Congress intended any manipulation or restructuring of the substantive content of a record when it commanded agencies to 'delete' exempt information."

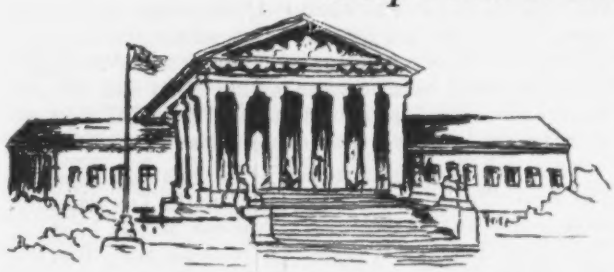
***Wolfe v. Department of Health & Human Services*, 3 GDS ¶82,303 (D.D.C., May 7, 1982) (appeal pending).**

In a case of first impression, D.C. District Court Judge Gerhard A. Gesell ruled that the Department of Health and Human Services (HHS) transition team report is not an agency record subject to the FOIA. The decision turned on whether HHS personnel exercised "control" over the report, and Judge Gesell found that the only copies of the report located at the agency were kept in a locked bookcase of the HHS chief of staff, that the copies had not been co-mingled with official department records, and that they had never been used by any employee of HHS for any purpose except in the defense of the instant litigation. In reaching the conclusion that the report was therefore not to be regarded as an "agency record" accessible under the FOIA, Judge Gesell observed that the suggestion of the central transition team that such reports be kept segregated from agency files was not contrary to the spirit of the FOIA, but instead protected the confidentiality of advice to the President.

***Government Land Bank v. General Services Administration*, 671 F.2d 663 (1st Cir. 1982).**

The U.S. Court of Appeals for the First Circuit in this case ruled that Exemption 5 protects realty appraisals obtained by the General Services Administration. Citing *Federal Open Market Committee v. Merrill*, 443 U.S. 340 (1979), the First Circuit found that the qualified privilege for confidential commercial information under Exemption 5 applies where a document contains "sensitive information not otherwise available" if its disclosure would significantly harm the Government's commercial interests. The court concluded that realty appraisals are "prime candidates" for exemption under *Merrill*. This appraisal was sensitive because it was a critical factor in computing both the initial asking price and the "rock bottom" price. Therefore, pre-sale disclosure would harm the agency's commercial interests by weakening its bargaining position. In the words of the court, "...FOIA should not be used to allow the Government's customers to pick the taxpayers' pockets."

Supreme Court Update



As the Supreme Court approached the end of its current Term, it twice reversed the U.S. Court of Appeals for the District of Columbia Circuit, giving the Government two major victories in cases raising similar threshold issues under Exemption 6 and Exemption 7 of the FOIA.

In *Federal Bureau of Investigation v. Abramson*, ___ S. CT. ___, 50 U.S.L.W. 4530, 3 GDS ¶82,316 (U.S., May 24, 1982), the Court held that information initially compiled for law enforcement purposes does not lose its Exemption 7 character when later incorporated or summarized in a document prepared for other than a law enforcement purpose. The documents at issue contained sensitive information originally compiled by the FBI for law enforcement purposes before its recompilation for other purposes.

Justice Byron White, writing for a five-member majority, found that the overall objectives of FOIA would be frustrated if Exemption 7 information were held to lose its status in such derivative documents.

Citing *FOIA Update* among other sources, Justice White noted the difficulty that law enforcement agencies encounter with reluctant informants concerned about the Government's ability to protect their identities. Accordingly, because the D.C. Circuit's rigid interpretation had "created a substantial prospect" that information initially gathered for law enforcement purposes would ultimately be disclosed, the majority refused to accept it as a proper interpretation of Congressional intent and ruled in favor of nondisclosure. Four justices, led by Justice Sandra O'Connor, dissented with respect to the majority's findings as to Congressional intent.

In *United States Department of State v. Washington Post*, 102 S.Ct. 1957 (May 17, 1982), the Supreme Court unanimously ruled in the Government's favor, giving a broad interpretation to the "similar files" threshold of Exemption 6, as it reversed the most recent of a series of decisions by the U.S. Court of Appeals for the District of Columbia Circuit that had narrowly construed that standard. The case involved the existence of documents possibly revealing whether two Iranian nationals living in Iran had ever become U.S. citizens.

The State Department denied the request on Exemption 6 grounds, arguing that any release of such information would endanger the lives of the two men, but the D.C. Circuit held that information regarding citizenship is less "intimate" than that normally found in personnel or medical files and therefore could not be withheld as a "similar file" under Exemption 6.

Justice William Rehnquist, however, writing for the Court, examined the legislative history and found that the phrase "similar files" was intended to have a broad meaning. He also reasoned that since personnel and medical files properly withheld under Exemption 6 may contain personal yet non-intimate data about an individual—such as place of birth, dates of birth and marriage and employment history—it would be anomalous if this same information could not be exempt from disclosure merely because it were not contained in a personnel or medical file.

Therefore, he held, so long as the information sought relates to a particular identifiable individual, it qualifies as "similar file" material. Concluding that the citizenship information sought by the plaintiff did satisfy this threshold requirement, the Court remanded the matter for a determination as to whether "release of the information would constitute a clearly unwarranted invasion of personal privacy."

This brings to three the number of FOIA cases decided by the Supreme Court during its 1981 Term. Earlier this year, the Court found that the Census Act qualifies as an Exemption 3 statute, in *Baldrige v. Shapiro*, 102 S.Ct. 1103, 71 L.Ed.2d 199 (February 24, 1982).

FOIA Counselor: Protecting 'Outside' Advice

In its day-to-day operations, the Government often relies on information and advice provided by "outside sources." In fact, such communications frequently are crucial to Government decisionmaking. Documents generated by "outside sources," if they qualify as "agency records," become subject to the disclosure provisions of the FOIA. *See, e.g., Carson v. Department of Justice*, 631 F.2d 1008, 1011 (D.C. Cir. 1980). In processing FOIA requests for such documents, the question often arises whether the FOIA's privileged communication exemption, Exemption 5, can be invoked.

In order for a document to be withheld under Exemption 5, it must be an "inter-agency or intra-agency" communication which would not routinely be available by law to a party in litigation with the agency. 5 U.S.C. §552(b)(5). Hence, the focus on the judicial interpretation given the phrase "inter-agency or intra-agency" is critical in determining whether documents generated by entities outside the executive branch of the Government can be withheld.

The landmark case addressing this issue is *Soucie v. David*, 448 F.2d 1067 (D.C. Cir. 1971), which involved "outside" consultants hired to provide an assessment of the nation's supersonic transport development program. The U.S. Court of Appeals for the District of Columbia Circuit held that the rationale of Exemption 5 would permit treating the consultants' report as an intra-agency memorandum, even though the consultants were plainly not government employees. The court of appeals observed: "The Government may have a special need for the opinions and recommendations of temporary consultants, and those individuals should be able to give their judgments freely without fear of publicity." 448 F.2d 1078 n.44.

Subsequent to *Soucie*, it has been held in numerous cases that "outside" documents may be considered to be inter- or intra-agency memoranda for Exemption 5 purposes. In reviewing these cases, it is convenient to group them according to similar factual backgrounds.

In the first group, the Government occupies the role of information buyer. *See, e.g., Lead Industries Ass'n, Inc. v. OSHA*, 610 F.2d 70, 83 (2d Cir. 1979) (reports commissioned in course of preparing standards for occupational exposure to lead); *Hoover v. Dept. of the Interior*, 611 F.2d 1132, 1133 (5th Cir. 1980) (real estate appraisal procured to aid in the purchase or condemnation of property); *Government Land Bank v. General Services Administration*, 671 F.2d 663, 665 (1st Cir. 1982) (independent real estate appraisal performed to assist in sale of surplus property).

A second group of cases is similar in that information and advice have been solicited by the Government from knowledgeable "outside sources," but are provided voluntarily and without compensation. These recommendations, therefore, usually emanate from less formal relationships between the Government and "outside parties." *See, e.g., Wu v. National Endowment for Humanities*, 460 F.2d 1030, 1032 (5th Cir. 1972) (evaluations of grant requests prepared by unpaid college professors); *Ryan v. Department of Justice*, 617 F.2d 781 (D.C. Cir. 1980) (responses to Justice Department questionnaires by Senators regarding recommendation of candidates for judgeships). In *Ryan*, the D.C. Circuit emphasized the importance of adopting a "common sense" interpretation of "intra-agency," noting that an overly-literal reading of this language would work to reduce the flow of necessary information and thereby impair the decisionmaking process. *See* 617 F.2d at 790.

A final category involves documents neither solicited nor paid for, but rather voluntarily provided to the Government by "outside parties" acting on their own initiative. *See Information Acquisition Corp. v. Department of Justice*, Civil Action No. 77-839 (D.D.C., May 23, 1979), which involved, *inter alia*, letters from private citizens and public officials commenting on the qualifications of William Rehnquist and others for nomination to the Supreme Court. In upholding nondisclosure, the court stated: "Public dissemination of these 44 documents could chill the extent to which citizens and officials participate in the appointment process."

In contrast, the U.S. Court of Appeals for the First Circuit recently announced a narrow interpretation of Exemption 5's "inter-agency or intra-agency" language. *County of Madison v. Department of Justice*, 641 F.2d 1036 (1st Cir. 1981), involved settlement correspondence between the Government and the Oneida Indian Nations, sought by parties to related litigation. The Government conceded that the correspondence was not literally inter-agency or intra-agency letters, but argued that it was deliberative in nature and that all future settlement negotiations would be significantly hindered by disclosure. Citing *Ryan* and *Wu*, the Government urged the court to apply a practical construction in order to protect these communications.

While apparently sympathetic to these policy arguments, the First Circuit nevertheless rejected the Government's contentions, stating that "[w]e perceive of no way, however, to describe the Oneidas' lawyers as 'intra-agency'—that is to say 'within the Department of Justice'—that does not simply omit the term 'intra-agency' from the Act in pursuit of policy ends." 641 F.2d at 1040. The First Circuit did, however, distinguish the prior cases, stating that they dealt with documents solicited by the Government from outside sources. It explained: "In this case, by contrast, the Oneidas approached the government with their own interest in mind.... [E]xpanding exemption 5 to include self-seeking petitioners 'within' agencies would do more violence to statutory language than Congress' direction permits." *Id.*

The First Circuit's solicitation/nonsolicitation distinction, however, appears to be neither workable nor legally appropriate. The court of appeals itself admitted that the line between supplicants and consultants may not be clear in every case. *See* 641 F.2d at 1042. Moreover, such a test would exclude from Exemption 5 protection valuable unsolicited advice which is often crucial to the deliberative process. Whether initiated by the Government or by its adversaries, the settlement of claims serves to minimize or eliminate costly litigation and therefore is very much in the public interest. A more flexible reading of Exemption 5's "inter-agency or intra-agency" language would have better served the central purpose of this statutory exemption, that of protecting the deliberative processes of Government.

In sum, the courts have consistently afforded Exemption 5 protection to documents solicited from "outside sources" which are used in an agency's deliberative process. Regarding unsolicited documents, however, judicial precedent is not yet settled. Nevertheless, strong legal and policy considerations argue in favor of protecting *all* advice and recommendations used in agency decisionmaking.

FOIA Focus: Leonard Schaitman

Whenever the Government suffers an adverse decision in a case, the Department of Justice, as the Government's lawyer, must decide whether to appeal that ruling. Appeals are never automatic, but instead result from a carefully structured process that brings the case and recommendations from many lawyers to the desk of the Solicitor General. By regulation, the final call on all potential appeals, petitions for reconsideration by an entire appellate court (rehearing en banc), and petitions for certiorari to the Supreme Court rests with the Solicitor General.

In the Freedom of Information Act area a key person in this appeals process is Leonard Schaitman, a career Government lawyer who plays a major role in formulating appeals recommendations to the Solicitor General and supervising FOIA litigation for the Appellate Staff of the Department of Justice's Civil Division.

During his 16-year career with "Civil Appellate," Schaitman has seen enactment, implementation and amendment of the FOIA, and he has played a pivotal part in the development of judicial precedent interpreting the various provisions of the FOIA at the appellate court level.

As an assistant director of the Appellate Staff, Schaitman exercises significant responsibility in the Government's efforts to obtain favorable precedents in appellate FOIA cases, whether the Government is appealing an adverse trial court ruling or, as is far more often the case, defending a trial court victory.

The Appellate Staff consists of 38 attorneys, a director, a deputy director, and four assistant directors, including Schaitman. As the Appellate Staff handles a broad range of Civil Division cases, Schaitman works in other areas in addition to FOIA.

In the early days of FOIA, which Schaitman now calls "the horse and buggy days," and on through the mid-1970s, he personally briefed and argued many FOIA cases in the courts of appeals. These cases included *Wine Hobby v. Bureau of Alcohol, Tobacco & Firearms*, which established a broad construction of the phrase "similar files" in Exemption 6. (The Supreme Court in *Washington Post* recently adopted the *Wine Hobby* construction

of that critical threshold term.)

These days, Schaitman's responsibilities tend to keep him out of the courtroom. But as a reviewer for other attorneys, a ready source on FOIA law and as a senior advisor, Schaitman views himself not as a policymaker but as a litigator. Part of his job is to give sound advice on how to avoid problems and be consistent in policy.

According to Schaitman, there are four types of factors which the Appellate Staff and, in turn, the Solicitor General will look at in determining whether a case is right for appeal. These are: "(1) Is the Government hurt by the loss? (2) What is the law? Will the case law support an appeal? (3) What is our legal strategy? Is this a good case to appeal? (4) What are the recommendations of the trial attorney? What does the client want?"

"Sometimes," he says, "you get one and it's very clear. The case just has to be appealed. In other cases, the indicators are mixed and the Solicitor General must weigh everything and come out with a decision. It's his decision to make."

Schaitman estimates that in the majority of the FOIA cases, the determination is against appeal. Of cases that are appealed, he says, the Government has a good record of wins, which is similar to the Government's overall record in appeals in non-FOIA cases. This past year, the Supreme Court decided three FOIA cases, all in the Government's favor.

Schaitman has come to see the present period as "the time of the FOIA establishment." This is marked by more sophistication on the parts of plaintiffs and defendants alike, by more knowledge about the FOIA, by industries which have grown up around the law, and by more people who know how to handle FOIA cases.

"These days the FOIA is virtually a tool which every lawyer has to know how to use...which leads to more litigation," says Schaitman. And, of course, more appeals.

Training Opportunities

DEPARTMENT OF JUSTICE

Legal Education Institute: Information Law for Attorneys and Paralegals, August 18-19, Nov. 16-17, Washington, D.C. Open to any attorney or paralegal in federal employment. Telephone (FTS) 673-6372 for additional information. No charge.

USDA GRADUATE SCHOOL

Implementation of FOIA and Privacy Act for FOI/PA Adminstrative Personnel, Sept. 9-10, Dec. 2-3, 600 Maryland Ave., SW, Room 108, Washington, D.C. 20024. Telephone Debbie Mitchell at (FTS) 447-3247 for additional information. Price: $165.

OFFICE OF PERSONNEL MANAGEMENT

Supervisory and Communications Training Center, Washington, D.C.: FOIA and PA Workshop for Administrative and Secretarial Personnel, July 19-20, Thomas Circle Training Center, 1121 Vermont Ave., NW, Washington, D.C. 20005. Telephone Stanley Betterman at (FTS) 254-3211 for additional information. Price: $200.

Government Affairs Institute: Fourth Annual Symposium on the Freedom of Information Act and the Privacy Act, August 12-13, Washington, D.C. Telephone (FTS) 632-5662 for additional information. Price: $250.

Northwest Regional Training Center: Freedom of Information and Privacy Act, August 16-17, Seattle, WA. Telephone John Malloy at (FTS) 339-7904 for additional information. Price: $125.

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JUSTICE DEPARTMENT MATERIALS

• Written policy statements on various FOIA-related issues. Available from the Office of Information and Privacy, 550 11th St. NW, 9th Floor, Washington, D.C. 20530.

• Attorney General's May 4, 1981, Memorandum on the Freedom of Information Act. Available from the Office of Information and Privacy, 550 11th St. NW, 9th Floor, Washington, D.C. 20530.

• *Attorney General's Memorandum on the 1974 Amendments to the Freedom of Information Act,* February 1975, 26 pages and appendices. Available from the Office of Information and Privacy, 550 11th St. NW, 9th Floor, Washington, D.C. 20530.

• *Attorney General's Memorandum on the Public Information Section of the Administrative Procedure Act (FOIA),* June 1967, 40 pages. Reprinted in the Joint Source Book and PH Gov. Disclosure Service, Vol. 1, ¶300, 601 (1979).

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U.S. Department of Justice
Office of Information and Privacy

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FOIA UPDATE

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Protecting Privacy

In today's complex society, the range and quantity of personal information maintained by governments about their citizens is enormous. While the maintenance and use of sensitive personal data is unquestionably necessary to the effective functioning of our Federal Government, there exists a concomitant responsibility on all government agencies to devote attention and care to the protection of individual privacy interests in such information.

The Freedom of Information Act, while promoting a spirit of general openness in government, provides specific protection for personal privacy interests through both Exemption 6 and, in the context of law enforcement records, Exemption 7(C). The importance of these two exemptions was recently emphasized by their being the subjects of the two major FOIA decisions handed down by the Supreme Court during its 1981-1982 Term: *Department of State v. Washington Post Co.*, 102 S.Ct. 1957 (1982) (Exemption 6), and *Federal Bureau of Investigation v. Abramson*, 102 S.Ct. 2054 (1982) (Exemption 7(C)).

Particularly through its decision in *Washington Post*, the Supreme Court has revitalized the commonsense, practical approach of giving privacy considerations their full weight in the delicate balancing process by which agencies must determine whether the disclosure of personal information under the FOIA is warranted. In the wake of *Washington Post*, agencies can now ensure that needed protection is accorded to any "information which applies to a particular individual." 102 S.Ct. at 1961.

To highlight the protection of personal privacy interests in government information—which surely is one of the most important of agency responsibilities in their implementation of the Freedom of Information Act—this issue of *FOIA Update* is devoted to the theme of protecting personal privacy under both Exemption 6 and Exemption 7(C).

On Agency Practice

Privacy Protection Practices Examined

All federal agencies maintain at least some sensitive personal privacy information in their files, even if only in the personnel records kept on agency employees. Some agencies maintain virtually "cradle to grave" information about American citizens.

The proper protection of such information is a responsibility to be discharged as carefully as possible by all agencies, under both the FOIA and the Privacy Act of 1974, and many agencies have established formal procedures by which they do so. Agency practices in this area necessarily vary according to the types of personal information maintained.

Department of Defense

The Department of Defense is one of those agencies which truly maintains "cradle to grave" personal records, according to Lt. Col. William C. Goforth, coordinator of privacy matters for DOD.

"We have the records of complete communities," says Col. Goforth. "Of everything from the grocery store to the mortuary. We have schools from kindergarten through the war college. We have medical records on service members and their families. At DOD, we have records on just about any sort of matter that could be regarded as privacy-related."

In recognition of this wide range of personal information, DOD in 1975 established the Defense Privacy Board to resolve privacy issues within DOD and to promote the uniform treatment of issues arising under both the FOIA and the Privacy Act. "While the primary focus is usually on the Privacy Act's protections," Goforth says, "we must remember that determining permitted disclosure under the Privacy Act quite often requires a disclosure analysis under Exemption 6 of the FOIA." (*See FOIA Update*, March 1982, page 3.)

The Defense Privacy Board is headed by D. O. Cooke, a deputy assistant secretary of defense. Each of the armed services appoints a representative to the board, as do the DOD general counsel and the Defense Logistics Agency. Representatives from other DOD components are appointed from time to time. Privacy questions are submitted to the board.

Cont'd on next page

Inside *Update*

The four center pages of this issue contain an updated list of the principal FOIA legal and administrative contacts at federal agencies.

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... Agency Privacy Procedures

where Col. Goforth, who serves as staff executive, researches them for the board's legal committee, comprised of component attorneys. Usually, the legal committee hammers out a proposed answer for approval by the board. When the legal committee cannot agree, the question is submitted to the board for full consideration.

Defense Privacy Board decisions, if they are of broad interest, are published and circulated to all DOD components. Thus far in 1982, there have been four major board decisions, including a revision of its guidelines covering the release of information from military personnel records.

The guidelines provide, in part: "Although it is not possible to categorically identify information that must be withheld or released from military records in every instance, the following items of personal information may normally be released from military records without an unwarranted invasion of personal privacy: name, rank, date of rank, gross salary, present and past duty assignments, future assignments which have been finalized, duty or office telephone number, source of commission, military and civilian educational level and promotion sequence number."

Goforth observes that the "hard areas" where problems keep coming up time and time again include: "Demographic studies ... drug and alcohol records ... financial records ... and lists, don't forget the lists."

Currently, Goforth and the board's legal committee are working on a policy on lists—mailing lists, lists of names, and other lists of various kinds. He expects that there will be a DOD policy on the release of privacy information in lists before the year's end.

National Institutes of Health

At the National Institutes of Health, a sub-agency of the Department of Health and Human Resources, a great deal of personal information comes into the agency's possession through its grant and contracting activities. Before awarding a research grant or contract, NIH analyzes the backgrounds and credentials of persons connected with the proposed project.

In recognition of the privacy considerations involved, NIH has developed guidelines for submitters governing the disclosure of such information. "This allows them to have a fairly clear idea of what will and will not be disclosed," says Bowen Hosford, the drafter of the guidelines.

He points out that NIH also stresses to submitters that it needs "an adequate and convincing justification" in order to withhold such personal information under Exemption 6. Says Hosford, "NIH must balance the need to keep a person's private affairs from public scrutiny against the public's right to information pertaining to the award of Government grants and contracts."

Under its guidelines, NIH usually releases almost all information about the principals involved. It does, however, protect the names and any identifying details about support staff. But except for names and other identifying information, NIH usually discloses the information in all resumes submitted. "By withholding the identifying information alone," Hosford says, "we feel that we're properly striking the balance with full regard for the public's right to know."

Federal Bureau of Investigation

At the Federal Bureau of Investigation, where a great deal of sensitive investigatory information is amassed, special measures are taken to ensure full privacy protection for persons mentioned in investigatory files. The FBI, as well as other federal law enforcement agencies, takes the position that even the mention of a person's name in the context of a law enforcement investigation is so laden with privacy implications that it almost always should be kept secret pursuant to Exemption 7(C).

As a logical extension of that principle, the FBI takes the position that it will not even acknowledge the existence of an investigatory file on someone without that person's consent. Thus, all third party requests for FBI records on individuals are met with the response that the requester must submit a notarized authorization from that person permitting the FBI to acknowledge the existence of any such records.

Absent the receipt of a proper authorization, or unless the person is so notorious that the fact of an FBI investigation is widely known, the FBI refuses on threshold privacy grounds either to confirm or deny the existence of any responsive records. Says FBI FOIPA Section Chief James K. Hall: "We believe this position is absolutely necessary to provide proper personal privacy protection in the law enforcement context."

OIP To Publish 1982 Case List

The Office of Information and Privacy (OIP) will publish later this month the 1982 edition of the *Freedom of Information Case List*, containing the most comprehensive listings of published and unpublished federal access decisions to date.

This year more than 1,500 FOIA and Privacy Act access cases, with full case histories, will be listed alphabetically and also indexed according to subject matter topics. More than 500 new decisions will be listed this year, including some pre-1981 decisions located through new research efforts.

In addition, there will be separate updated listings of cases interpreting all aspects of the Privacy Act of 1974, the Government in the Sunshine Act and the Federal Advisory Committee Act, as well as an updated list of all "reverse" FOIA cases. The *Case List* will also include a completely new "Short Guide to the Freedom of Information Act," as well as revised citations to related law review articles.

Edited by Yvette P. Rhodes of the OIP staff, the 1982 *Case List* will be available through the Superintendent of Documents, GPO, Washington, D.C. 20402. The price is expected to be approximately $7.50 per copy.

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FOIA UPDATE

OIP Guidance

Privacy Protection Considerations

Although determinations made under the Freedom of Information Act of the extent to which personal privacy can be protected generally require an individualized case-by-case analysis, there are two particular types of requests for personal information which can consistently be handled according to general guidelines. Both such types of requests—for personnel information regarding federal employees and for the current home addresses of private citizens—can be made of virtually every federal agency.

■As all agencies maintain personal information about their employees in personnel files, the need to make consistent disclosure determinations with respect to such information is universal. Under Office of Personnel Management regulations, certain basic information on most federal employees must routinely be made available to the public: (1) name; (2) present and past position titles; (3) present and past grades; (4) present and past salaries; and (5) present and past duty stations, including specific location details such as room number. *See* 5 C.F.R. §294.702(a)(1982). (OPM will soon propose, in a new Part 293, slight revisions of two of these basic items and the addition of an item covering position descriptions and performance elements and standards.)

Further, it is the policy of the Department of Justice, in light of prevailing FOIA case law, to release additional items of information in personnel files, particularly pertaining to the professional qualifications of federal employees. Such information generally disclosed includes post-graduate or technical education in preparation for the employee's profession; all prior employment in State or Federal Government positions; prior employment in the private sector related to an employee's duties; awards and honors received; and membership in professional groups.

The Department of Justice further endorses release of the fact of recommendations for promotions, appointments or reassignments; letters of commendation from professional associates and colleagues; appointment affidavits and oaths of office; and creditable service for leave purposes.

Information which should be withheld from third parties pursuant to Exemption 6 generally pertains to an employee's personal life and family status. Matters capable of causing embarrassment and/or harassment and which are not pertinent to the employee's duties should also be protected under Exemption 6. Such privacy interests specifically include, but are not limited to, place and date of birth; age; marital status; home address and telephone number; medical records; details of health and insurance benefits; the substance of promotion recommendations; supervisory assessments of professional conduct and ability; information concerning or provided by relatives and references; prior employment not related to the employee's occupation; primary, secondary and collegiate education; allegations of misconduct or arrests; and military service number and Social Security number.

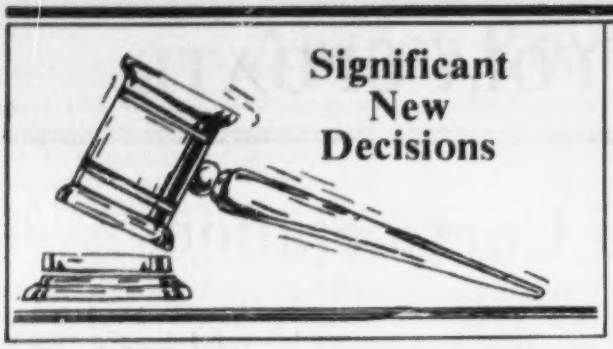
Such delineations are based upon the principle that the public is entitled to information that generally pertains to the qualifications for and the performance of federal employment, but that federal employees are as fundamentally entitled to privacy protection as are members of the public. They are recommended for all federal agencies.

■Requests for access to agency records reflecting the current home addresses or whereabouts of third parties are frequently made by estranged family members or local authorities who need to locate people urgently. *(See, e.g.,* "FOIA Focus," page 7.) In responding to such requests, a number of factors should be taken into consideration.

First, the way in which the address was obtained and the form in which it is maintained must be considered. Either may trigger the application of a particular statute precluding the release of the information under Exemption 3 of the FOIA. For example, if the address originated as IRS information it likely would have been taken from the individual's tax return and would be prohibited from disclosure under the Tax Reform Act of 1976, 26 U.S.C. §6103. Another example is an address derived from a claim for veteran's benefits; access to such information is restricted by 38 U.S.C. §3301. (It is important to note, however, that both statutes provide for release of personal information to local courts or other authorities in certain situations, such as child support cases. *See, e.g.,* 26 U.S.C. §6103(1)(6); 38 U.S.C. §3301(b), (f)).

Traditionally, third party requests for access to addresses have been denied on the basis of FOIA Exemption 6. However, Exemption 6, perhaps more than any other FOIA exemption, permits agencies broad discretion in determining whether access is appropriate. After discerning the magnitude of the invasion of privacy which would be expected to result from a requested disclosure, a determination of any possible public benefit must be made. In this context, for example, there is a high degree of public interest in cases in which requesters seek information for child support purposes, in that the public will be benefited overall if parents support their children. Likewise, of course, agencies should be as responsive as possible to particularly urgent requests received from police or hospital authorities. Requests based upon assertions of this type of critical need, when accompanied by showings sufficient to enable agency employees to verify them, should be honored as a matter of policy.

Moreover, even where release of an address is prohibited by statute or outweighed by privacy interests, a letter or some similar type of notification to the individual sought may satisfactorily resolve the request. Some agencies routinely forward such request letters, while others send letters of their own. Under either procedure, an agency can give persons sought an opportunity to contact the requesters, while still affording them continued freedom from unwanted intrusions on their privacy.



***Taylor v. Department of the Army*, 684 F.2d 99 (D.C. Cir. 1982).**

The Court of Appeals for the D.C. Circuit in this case reversed a district court disclosure order, holding that Exemption 1 can properly be applied to protect a sensitive "compilation" of materials which were not necessarily classified in their component parts.

The documents sought were certain ratings of major combat units which the Army contended could in the aggregate provide insights into overall military capability. Yet its classification judgment was rejected by the district court on both substantive and procedural grounds. The D.C. Circuit reversed, however, holding that the Army's affidavits were "specific as to the nature of the information sought and the damage its disclosure would pose to the national security." While the court of appeals noted a possible conflict in applicable Army regulations, it observed that "the regulations cannot override the Executive Order, which is controlling." The court of appeals rejected plaintiff's argument that the compilation problem could be circumvented, citing its rejection of such an argument in a previous case and an Army affidavit assuring that any such attempt would be quickly detected. Significantly, the D.C. Circuit declared that such agency affidavits pertaining to classification matters are entitled to "the utmost deference" from the courts.

***Skelton v. U.S. Postal Service*, 678 F.2d 35 (5th Cir. 1982).**

The Court of Appeals for the Fifth Circuit has provided valuable new guidance on what constitutes a "final opinion" subject to the "incorporation by reference" rule for Exemption 5 set forth by the Supreme Court in *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132 (1975). The case involved a letter in which a Postal Service official, based upon an investigatory report, refused Skelton's demand that four employees be disciplined. In response to Skelton's FOIA request, the agency withheld under Exemption 5 a portion of the report containing candid opinions concerning Skelton's motivation for making the demand. In court, Skelton argued that the report had no predecisional status because it was incorporated by reference in the letter, which he said was a "final opinion." The Fifth Circuit rejected Skelton's argument, however, holding that not all "post-decisional" documents are "final opinions." It carefully analyzed and distinguished the Supreme Court's decision in *Sears*, on the grounds that neither a statute nor agency regulations required the Postal Service to consider Skelton's charges and that the matter "was thus not the adjudication of a 'case' that is at all similar to the 'case' at issue in *Sears*." In conclusion, the Fifth Circuit observed: "We do not think that every writing memorializing a 'decision,' no matter how insignificant or routine the 'decision' is, thereby becomes a 'final opinion' subject to the incorporation by reference exception."

***Arieff v. Department of the Navy*, 3 GDS ¶82,291 (D.D.C. April 27, 1982) (appeal pending).**

Adopting a "mosaic" approach for Exemption 6, the District Court for the District of Columbia has held that the Navy does not have to disclose records of the aggregate quantities of prescription drugs dispensed to Congress' Office of the Attending Physician (OAP), even where the names of recipients are not provided. The controversy focused on computer print-outs which listed all such drugs distributed without directly identifying the ultimate recipients. The court found that when coupled with a working knowledge of the symptoms and purposes for which certain drugs are prescribed, such information could "be used to learn the intimate details of the medical care of OAP patients." Relying on the "jigsaw puzzle" or "mosaic" approach adopted by the D.C. Circuit for intelligence information in *Halperin v. CIA*, 629 F.2d 144 (D.C. Cir. 1980), the court reasoned that disclosure of the fact that a certain drug was prescribed "could be the 'missing link' for a person with fragmented knowledge about a Member's health." Extension of the "mosaic" principle to Exemption 6 in this case is particularly significant because of the relatively large number of potential recipients involved.

***Alirez v. National Labor Relations Board*, 676 F.2d 423 (10th Cir. 1982).**

According to the Court of Appeals for the Tenth Circuit, Exemption 7(C) may be applied to withhold in full statements obtained by the NLRB from employees in the course of an unfair labor practice investigation. The documents at issue contained allegations of employer misconduct as well as sensitive personal information about some employees. The trial court had ruled that only the names, addresses and phone numbers of the persons mentioned could be withheld. In reversing, however, the Tenth Circuit recognized that releasing all but the identifying data would not adequately protect the privacy interests involved, especially given that the documents related to only a limited number of incidents and a relatively small number of persons. "Even sanitized, these documents would enable [the requester], and others who had specific knowledge of these incidents, to identify readily the informant and persons discussed in each document," the court of appeals concluded.

***Holy Spirit Ass'n v. Federal Bureau of Investigation*, 683 F.2d 562 (D.C. Cir. 1982).**

The Court of Appeals for the D.C. Circuit upheld the FBI's withholding, under Exemption 7(C), of names and other identifying information communicated by citizens to federal agencies, in some cases through their elected representatives, about the Holy Spirit Association. In a noteworthy concurrence, Circuit Judge George E. MacKinnon emphasized that "particularly significant privacy interests" are at stake when individuals provide law enforcement agencies with allegations of possibly illegal activities, and that "[w]here a person's fear of reprisals from the subject of his communication is reasonable ... privacy interests support the application of both Exemption 6 and Exemption 7(C)." This should "apply with equal vigor" to information provided by a Congressman acting for a constituent, Judge MacKinnon reasoned. Although most such communications may not involve personal privacy interests, he found, "communications urging investigation of a third party, or disclosing intimate personal details in the hope of prompting legislative action, certainly fall within the privacy concerns protected by Exemptions 6 and 7(C)."

U.S. Department of Justice
Office of Information and Privacy

FOIA UPDATE

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For inter-agency contact purposes, the following list contains the principal FOIA legal and administrative contacts at all federal agencies dealing regularly with FOIA matters. In some instances (*e.g.*, Department of Defense), all major agency components are listed individually under the agency. In other instances (*e.g.*, Food and Drug Administration), major agency components are listed separately. In still other instances (*e.g.*, Department of Labor), no components are listed, as it is the agency's preference that all FOIA contacts be made through its main FOIA offices.

All telephone numbers are FTS numbers unless a local area code is listed. When both the legal and administrative contacts (marked "L" and "A" respectively) are at the same address, the common address follows the name of the administrative contact. OIP should be advised when there is a change in a legal or administrative contact or any change in address, telephone number or title.

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To what extent are "public figures" entitled to the privacy protections of the Freedom of Information Act?

The fact that persons have placed themselves in the public eye may indeed lessen their expectations of privacy. *See Common Cause v. National Archives & Records Service,* 628 F.2d 179, 184 (D.C. Cir. 1980); *Lamont v. Department of Justice,* 475 F. Supp. 761, 778 (S.D.N.Y. 1979). However, the Court of Appeals for the D.C. Circuit has made it clear that "public figures" are certainly entitled to privacy protection under the FOIA and that disclosure of particularly sensitive information about such persons is appropriate "only where exceptional interests militate in favor of disclosure." *Fund for Constitutional Government v. National Archives & Records Service,* 656 F.2d 856, 866 (D.C. Cir. 1981). Indeed, it must be remembered in gauging the severity of potential privacy invasions under Exemptions 6 and 7(C) that "[t]he degree of intrusion is indeed potentially augmented by the fact that the individual is a well known figure." *Fund for Constitutional Government, supra,* 656 F.2d at 865. *See also Rushford v. Civiletti,* 485 F. Supp. 477, 479-80 (D.D.C. 1980), *aff'd mem.,* 656 F.2d 900 (D.C. Cir. 1981). Thus, while it remains possible "under appropriate circumstances that an individual's status as a 'public figure' would tip the 7(C) balance in favor of disclosure," *Fund for Constitutional Government, supra,* 656 F.2d at 865, such persons surely do not forfeit all rights to privacy by virtue of that status. *See also Nix v. United States,* 572 F.2d 998, 1006 (4th Cir. 1978); *Ouellette v. Department of the Army,* 2 GDS ¶82,214 (D.D.C. March 5, 1982).

In balancing personal privacy interests against the public interest under Exemptions 6 and 7(C), can there ever be a public interest compelling *non*disclosure?

Yes. Many courts have implicitly recognized a public interest favoring the *non*disclosure of personal privacy information, particularly the public interest in avoiding the impairment of ongoing and future law enforcement investigations. *See, e.g., Miller v. Bell,* 661 F.2d 623, 631 (7th Cir. 1981); *Church of Scientology v. Department of State,* 493 F. Supp. 418, 421 (D.D.C. 1980); *Flower v. FBI,* 448 F. Supp. 567, 571-72 (W.D. Tex. 1978). More explicitly, the Court of Appeals for the D.C. Circuit in *Fund for Constitutional Government v. National Archives & Records Service,* 656 F.2d 856, 865 n.22 (D.C. Cir. 1981), specifically recognized that "public interest properly factors into both sides of the balance." *See also Martorano v. Department of Justice,* 3 GDS ¶82,344 (D.D.C. 1982); *Holy Spirit Ass'n v. Department of State,* 526 F. Supp. 1022, 1034 (S.D.N.Y. 1981). Thus, there is a sound basis in both logic and law for agencies to focus on any public interest served by *non*disclosure, to determine the "net" public interest involved, and to determine whether perhaps any public interest factors favoring disclosure "are outweighed by the very significant and tangible public interest" factors favoring *non*disclosure. *Rushford v. Civiletti,* 485 F. Supp. 477, 480 (D.D.C. 1980), *aff'd mem.,* 656 F.2d 900 (D.C. Cir. 1981).

Can the FOIA's privacy exemptions ever be invoked to protect a corporation?

It is well settled that the FOIA's privacy exemptions provide personal privacy protection and cannot be invoked to protect the interests of a corporation or association. *See, e.g., Sims v. CIA,* 642 F.2d 562, 572 n.47 (D.C. Cir. 1980); *National Parks & Conservation Ass'n v. Kleppe,* 547 F.2d 673, 685 n.44 (D.C. Cir. 1976). The only possible exception to this rule is that when a business is actually a closely-held corporation, or some other similarly-constituted business entity, Exemptions 6 and 7(C) may be invoked if disclosure would in effect invade an individual's privacy: "While corporations have no privacy, personal financial information is protected, including information about small businesses when the individual and corporation are identical." *Providence Journal Co. v. FBI,* 460 F. Supp. 778, 785 (D.R.I. 1978), *rev'd on other grounds,* 602 F.2d 1010 (1st Cir. 1979), *cert. denied,* 444 U.S. 1071 (1980). *See also National Parks, supra,* 547 F.2d at 686; *cf. Zeller v. United States,* 467 F. Supp. 487, 496-99 (E.D.N.Y. 1979).

Can Exemptions 6 and 7(C) be applied to protect the privacy of deceased persons?

No, not directly, but careful consideration should be given to whether such protection can be extended to others. After death, a person no longer possesses privacy rights. *See Diamond v. FBI,* 532 F. Supp. 216, 227 (S.D.N.Y. 1981); *but see Kiraly v. FBI,* 3 GDS ¶82,466 (N.D. Ohio Mar. 15, 1982). However, it is important to note that while privacy rights cannot be inherited by one's heirs, the disclosure of particularly sensitive personal information pertaining to a deceased person may well threaten the privacy interests of surviving family members or other close associates. *See, e.g., Lesar v. Department of Justice,* 636 F.2d 472, 486-88 (D.C. Cir. 1980); *see also Attorney General's Memorandum on the Public Information Section of the Administrative Procedure Act* at 36 (1967).

Must an agency disclose "mailing list" information to a FOIA requester, even one who evidently intends to use it for commercial purposes?

Although the purpose for which a requester seeks information under the FOIA is generally irrelevant to agency disclosure determinations, it may properly be considered by an agency under Exemptions 6 and 7(C). This is particularly appropriate in connection with requests for lists of names and addresses which can be used for commercial "mailing list" purposes. Unless disclosure of the information sought would invade no privacy interest at all, *see, e.g., National Western Life Ins. Co. v. United States,* 512 F. Supp. 454, 460-61 (N.D. Tex. 1980) (names and duty stations of postal employees), Exemption 6 case law strongly supports nondisclosure when the information is sought merely for commercial purposes. *See Wine Hobby USA, Inc. v. IRS,* 502 F.2d 133, 137 (3d Cir. 1974); *HMG Marketing Associates v. Freeman,* 523 F. Supp. 11, 14-15 (S.D.N.Y. 1980). On the other hand, where the request is for a purpose other than commercial exploitation, and there exists a demonstrable public interest in disclosure, the balance may be struck in favor of disclosing "mailing list" information. *See, e.g., Getman v. NLRB,* 450 F.2d 670, 674 (D.C. Cir. 1971); *Disabled Officers Ass'n v. Rumsfeld,* 428 F. Supp. 454, 458 (D.D.C. 1977). The FOIA reform bill approved by the Senate Judiciary Committee would provide express protection under Exemption 6 for "compilations or lists of names and addresses that could be used for solicitation purposes."

FOIA Counselor

Factoring In The 'Public Interest'

Two of the most difficult exemptions of the Freedom of Information Act to work with are its privacy exemptions, 6 and 7(C), the application of which involves a delicate balancing process. As the Supreme Court has put it, they "require a balancing of the individual's right of privacy against the preservation of the basic purpose of the Freedom of Information Act 'to open agency action to the light of public scrutiny.'" *Department of the Air Force v. Rose*, 425 U.S. 352, 372 (1976). *See also Lesar v. Department of Justice*, 636 F.2d 472, 486 & n.80 (D.C. Cir. 1980).

This process requires agencies to be familiar with the various protectable privacy interests to be taken into consideration on one side of the balance, as well as the types of public interest considerations which properly factor into the other side of the balance. Occasionally, agency personnel are uncertain about whether an asserted "public interest" in requested disclosure should be given significant weight, or even any weight at all, in the balancing process.

Some public interest factors are properly taken into consideration and accorded great weight. For example, the courts have found the public interest in disclosure to be strong when requested information would inform the public about proven violations of public trust. *See, e.g., Columbia Packing Co., Inc. v. Department of Agriculture*, 563 F.2d 495, 499 (1st Cir. 1977) (federal employees found guilty of accepting bribes); *Congressional News Syndicate v. Department of Justice*, 438 F. Supp. 538, 544 (D.D.C. 1977) (misconduct by White House staffers). As one court has observed, there is an "obvious public interest in a full and thorough airing of ... serious abuses that did in fact occur, in the hope that such abuses will not occur in the future." *Tax Reform Research Group v. IRS*, 419 F. Supp. 415, 418 (D.D.C. 1976).

Apart from proven government wrongdoing, the courts have recognized a variety of other public interest factors entitled to heavy, often dispositive, weight. *See, e.g., Ferri v. Bell*, 645 F.2d 1213, 1218 (3d Cir. 1981), *vacated & reinstated in part on rehearing*, 671 F.2d 769 (3d Cir. 1982) (attempt to expose alleged deal between prosecutor and witness found to be in public interest); *Getman v. NLRB*, 450 F.2d 670, 675-76 (D.C. Cir. 1971) (public interest need for study of union elections held sufficient to warrant release of names and addresses of employee voters); *Disabled Officers Ass'n v. Rumsfeld*, 428 F. Supp. 454, 458 (D.D.C. 1977) (nonprofit organization serving needs of disabled Air Force personnel held entitled to data on such personnel).

It must be remembered, however, that not all assertions of "public interest" under Exemptions 6 and 7(C) are legitimately entitled to any real weight in the balancing process. *See, e.g., Church of Scientology v. Department of the Army*, 611 F.2d 738, 747 (9th Cir. 1980) ("There could be no legitimate public purpose served by disclosure of this information."). For example, an allegation of "public interest" that is nothing more than "a general public curiosity" in the subject matter of requested records is legally insufficient. *Fund for Constitutional Government v. National Archives & Records Service*, 656 F.2d 856, 866 (D.C. Cir. 1981). Similarly, requesters who assert "no particular interests other than their own personal curiosity" actually assert nothing that properly weighs in favor of disclosure. *Tarnopol v. FBI*, 442 F. Supp. 5, 8 (D.D.C. 1977).

Of course, even when a requester identifies a specific and tangible disclosure interest, but one which is peculiar to the requester, there is no "public interest" compelling disclosure. *See, e.g., Committee on Masonic Homes v. NLRB*, 556 F.2d 214, 220 (3d Cir. 1977) ("we are not interested in the [requester's] benefit"); *cf. Aviation Data Service v. FAA*, 3 GDS ¶82,428 (10th Cir. August 4, 1982) ("self-interest was the primary factor ... the public benefit, if any, [was] almost nil") (attorney's fees context). By the same token, requesters who have a clear personal interest in obtaining disclosure, such as for use in private litigation, should expect to have their assertions of "public interest" scrutinized very carefully. *See, e.g., Lloyd & Henniger v. Marshall*, 526 F. Supp. 485, 487 (M.D. Fla. 1981) (assertion of vague "public interest" found to be "of no weight in the balance"). *See also Stauss v. IRS*, 516 F. Supp. 1218, 1222 n.7 (D.D.C. 1981) ("public interest" in identifying tax protesters in hopes of discouraging such activities or encouraging public debate found to be "somewhat specious").

Nor is there necessarily any legitimate "public interest" served by individual requesters who are self-appointed to provide generalized "services" to the public through access to information. *See, e.g., Harbolt v. Department of State*, 616 F.2d 772, 775 (5th Cir.) (federal prisoner's intention to contact and provide "services" to U.S. citizens imprisoned overseas furthers no public interest), *cert. denied*, 449 U.S. 856 (1980). One such requester attempted to make a "public interest" showing based upon the bare assertion that he would use the requested information "to serve as a watchdog over the adequacy and completeness of an FBI investigation," but that assertion was found to have "little weight" in the balancing process. *Miller v. Bell*, 661 F.2d 623, 630 (7th Cir. 1981). Indeed, many such assertions of "public interest" benefits flowing from disclosure are "too uncertain, indirect and remote" to properly factor into the balance. *Brown v. FBI*, 658 F.2d 71, 76 (2d Cir. 1981) (possibility of winning new trial through collateral attack of Government witness held "too uncertain" to serve public interest in fair administration of justice). *See also, e.g., Plain Dealer Publishing Co. v. Department of Labor*, 471 F. Supp. 1023, 1029-30 (D.D.C. 1979) (asserted "public interest" in monitoring operation of federal agency found to be "speculative").

In sum, while agencies making determinations under Exemptions 6 and 7(C) should give careful consideration to any true public interest which would be served by disclosure, some of the assertions of "public interest" factors advanced by requesters are entitled to little weight, if any, in the balancing process. Given the enormous importance and responsibility of protecting individual privacy rights—rights regarded as no less than "fundamental" in our jurisprudence, *e.g., Griswold v. Connecticut*, 381 U.S. 479, 485 (1965)—agency personnel applying the FOIA's privacy exemptions should always give penetrating scrutiny to assertions by requesters that disclosure of personal privacy information would somehow serve the "public interest."

FOIA Focus: Ethel A. Burrows

In the course of issuing Social Security numbers, compiling earnings information, paying out benefits to millions of retired or disabled workers and their dependents or survivors, and determining Medicare entitlements, the Social Security Administration amasses a great deal of personal information about Americans and their families. Consequently, when abandoned spouses, distraught parents, curious relatives, police officials or hospital administrators want to locate or identify someone, they often turn for assistance to SSA, where FOIA personnel perform the task of making difficult disclosure determinations by balancing public and private interests.

A great many such requests for personal information cross the desk of Ethel A. Burrows, FOI specialist in the Office of Information at SSA headquarters in Baltimore.

The first FOI specialist hired by the Office of Information soon after enactment of the 1974 FOIA amendments, Ms. Burrows is a career public servant. She previously was a claims examiner and a training officer at other SSA components and, before entering public service, taught ninth grade English, among other jobs.

Today Ms. Burrows works with a staff of four other FOI specialists and detailees handling both initial access requests and appeals. As of June 1982, the responsibility for granting or denying all public requests for SSA information—except for information released under regulations—now rests with the Baltimore FOI staff.

"Previously, it had been a matter of expecting everybody in the agency to be an FOI specialist," Ms. Burrows says. "That's just not possible and the result was that we were sometimes inconsistent or maybe our efforts were duplicative. We've gone to the centralized approach to ensure consistency and to try to achieve better recordkeeping."

The FOI staff expects that centralizing the FOIA responsibility within one office will greatly increase the workload. Ms. Burrows says that since June her office's telephone consultations with other parts of SSA have doubled in volume. The closed caseload in previous years has averaged 300 initial requests and 80 appeals, and it will doubtless be much higher this year.

"And everything we do is a manual

operation. All we have are our typewriters, the telephone, and our individual memories," says Ms. Burrows.

"Most of the material we handle is in the Exemption 6 area—it's personal and it's important," Ms. Burrows says. "Currently our only major Exemption 3 statute is the Tax Reform Act of 1976, which applies to earnings information, so therefore we're usually looking at the personal privacy aspects of making a release or withholding material."

While literally thousands of people use SSA's letter-forwarding service (whereby SSA will forward a letter to contact a person for humanitarian purposes), other requests for personal information are not so simple.

Many of these, of course, come to the FOI staff where, Ms. Burrows says, the first step is to determine what records SSA in fact possesses. The second is to turn to the regulations and SSA's operating manuals to see if SSA has established guidelines for what may be released or what should properly be withheld. "Since most of our personal records are retrieved by Social Security number, we often have to find that first, before we can locate other records," she explains.

"If a requester wants more than letter-forwarding—for example, the address of a missing relative—we would get the request and we would check SSA's computer system. This could tell us whether a person is receiving a benefit or is dead.

"If he or she is deceased then we can usually tell the requester whatever is known—for example, how and where and when the person died. But if the individual is alive and is receiving benefits, then we have an Exemption 6 case. Our final determination will depend in part on what information we have, on why the requester needs to learn it, and on where the individual is. We also ask: Is there a public purpose to be served? Is the requester a parent seeking records of a minor, or perhaps a parent acting on behalf of a minor?"

Ms. Burrows gives the following examples of the types of privacy issues which SSA personnel must deal with:

- A woman took her baby to visit its father who was in the armed services overseas. He took the child from her and was subsequently killed in an accident. His girl friend flatly refused to return the child to the mother. Information regarding benefits being paid was disclosed to the mother.
- A disabled worker took his child from his wife. The man died and his girl friend assumed custody of the child. The real mother came to SSA several years later and asked for help in locating the child. SSA was reluctant to provide its information to the mother, but offered to disclose the information to a court. "These are tough decisions, the kind that a judge who can have full knowledge of all the facts should make," says Ms. Burrows.
- A hospital official telephoned. A young person had been severely injured in an accident. It was imperative that the family be reached so that a relative could give permission for an operation. SSA contacted the parents immediately.
- Local police authorities found a body abandoned on the side of a road. Among the effects was a Social Security number. The authorities needed additional information to establish the deceased person's identity. SSA personnel contacted the family of the holder of that number directly, learned that he was alive and well, but did not identify him further out of respect for his privacy.

Ms. Burrows notes that there are many similar calls from police. "It seems," she says, "people always leave Social Security numbers at the scenes of crimes. Usually someone else's.

"We deal daily with very serious problems," says Ethel Burrows. "To survive in this work what you need is a sense of humor."

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NON-GOVERNMENT

Center for National Security Studies, the American Civil Liberties Union, and the FOI Clearinghouse: Eighth Annual Seminar on the Federal FOIA and the Privacy Act, **Nov. 18-19,** Marvin Center Ballroom, 800 21st St., NW, Washington, D.C. Contact Ann Profozich (202) 544-5380. Price: $180 pre-registered; $190 at the door.

American Society of Access Professionals: Training in the Privacy Act: **Sept. 22, Sept. 29, Oct. 6, Oct. 13,** Department of Labor, 200 Constitution Ave., NW, Washington, D.C. Contact: Marilyn LeGrant (202) 694-3027, registration; Hugh O'Neill (202) 472-7453, program.

Survey Shows Training Needs

The interface between the FOIA and the Privacy Act of 1974, as well as the protection of personal privacy under FOIA Exemptions 6 and 7(C), emerged as prime areas in which FOIA specialists say they need training, according to the results of OIP's recent survey of FOIA and Privacy Act training needs in the Federal Government.

The survey, which was conducted through a questionnaire in the March 1982 issue of *FOIA Update*, also showed that "recent developments" is another area of high interest.

Courses in which the questionnaire respondents indicated they need training (and the number asking for the course) were as follows: interface of the Freedom of Information Act and the Privacy Act, 93; the Privacy Act, 82; recent developments, 81; protection of personal privacy, 75; administrative procedures, 62; protection of business data, 50; agency deliberative records, 41; interagency exchange of records, 27; classification review, 23; law enforcement records, 23; fees, 17; and redaction of records, 14.

Also noteworthy was that nearly one-third of the respondents expressed a preference for more advanced training. Of the respondents, slightly more than half were attorneys and the rest were FOIA specialists, disclosure officers, paralegals, program directors, management analysts, etc.

While the majority of respondents stated that they had received at least "occasional" FOIA training, 51 said that they had never received training but would like to. Almost all training received was through the Department of Justice's Legal Education Institute, the Office of Personnel Management, or various "in-house" courses.

The results of the survey have been made available to the Department of Justice's Legal Education Institute for use in the planning of future FOIA and Privacy Act training.

Certiorari Sought

The Government has petitioned for Supreme Court review of *Grolier, Inc. v. Federal Trade Commission*, 671 F.2d 53 (D.C. Cir. 1982), in which the U.S. Court of Appeals for the D.C. Circuit limited the attorney work-product privilege within Exemption 5 (see *FOIA Update*, June 1982).

Upcoming Issues

- Is the Copyright Act an Exemption 3 statute?
- Fee waiver policy.
- Protection of draft documents under *Russell v. Air Force*, 682 F.2d 1045 (D.C. Cir. 1982); *Arthur Andersen & Co. v. IRS*, 679 F.2d 254 (D.C. Cir. 1982).